91-1828

Supreme Court, U.S.
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No. 91-

In The

Supreme Court of the United States

October Term, 1991

GARY LEE ROCK,

Petitioner,

v.

LEROY S. ZIMMERMAN; JOHN F. NELSON, District Attorney,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the court below finding harmless error in a jury instruction allowing consideration of an unconstitutional presumption is in direct and irreconcilable conflict with the standards set forth in this Court's ruling in *Yates v. Evatt,* 111 S.Ct. 1884 (1991) and whether the ruling below conflicts with the decisions of other Courts of Appeals.

LIST OF PARTIES

All parties to this case are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gary Lee Rock respectfully requests that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit on March 24, 1992.

OPINIONS BELOW

The district court issued an opinion denying the petition for a writ of *habeas corpus* on January 22, 1990. This Opinion is reprinted at A-1.

On appeal, on March 24, 1992, the Court of Appeals for the Third Circuit, sitting *en banc*, affirmed the denial of the writ on a divided vote. This Opinion is reprinted at A-42.

JURISDICTION OF THE COURT

The opinion of the Court of Appeals was entered on March 24, 1992. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This case resulted from the tragic events that occurred in Franklin County, Pennsylvania on July 2, 1977. Prior to that date, Petitioner Gary Rock had led an entirely normal and unexceptional life. He was born and raised in Franklin County, was a high school graduate, and served in the United States Marine Corps during the Vietnam War. He had never previously been arrested and was a person of unquestionably good character. Upon his return to civilian life in Pennsylvania he secured employment and lived in a small cabin that he had completely renovated in the hills of Franklin County. N.T. 380-383.

On July 2, 1977 something went terribly wrong with Gary Rock. For unknown reasons, and after spending considerable time and money repairing and remodeling his house, he set the house and a nearby shed afire. N.T. 422-23. While the ensuing blaze engulfed the buildings, and while smoke, flames and noises from explosions

filled the air, Rock fired his rifle at what he thought were moving objects, but not people, coming down a dirt road towards his house. N.T. 429. Tragically, these moving objects were firemen and a neighbor responding to the fire. The shots killed the neighbor and the fire chief and struck and injured several other firemen.

Rock, dressed in marine fatigues and wearing his dog tag, was apprehended in the hills near his house. He was taken to a hospital for treatment, questioned by police authorities, and later arraigned on two counts of murder and six counts of attempted murder.

Gary Rock has maintained throughout this case that he set his house afire as a result of an inexplicable and uncontrollable rage, and that he did not intend to hurt or kill anyone. He testified at trial that he did not recognize the firefighters as people coming to help him and fired only at what he believed were moving objects. N.T. 429. No motive for his actions was demonstrated by the prosecution at trial.

Rock asserted the defenses of insanity, diminished capacity, and lack of criminal intent. Dr. Emanuel Tanay testified that in his expert opinion Gary Rock had suffered an acute psychotic breakdown that amounted to a dissociative reaction. N.T. 499. This condition, according to Dr. Tanay, precluded Rock from knowing the nature or quality of his acts and made him incapable of knowing whether his acts were wrong. N.T. 500. Rock also presented evidence and argued that he did not have a criminal intent to kill or injure. Accordingly, the primary issue at trial was the mental state of the defendant.

Petitioner was tried in January, 1985. On the critical issue of criminal intent, the trial court on two separate occasions instructed the jury that it could presume an intent to kill based on the use of a deadly weapon on a vital part of the body. On January 22, 1985, after ten hours of deliberations, the jury convicted Rock of two counts of first degree murder, four counts of attempted murder and two counts of aggravated assault.

The trial court imposed consecutive life terms on the murder charges and concurrent sentences on the aggravated assault charges, a sentence that substantially exceeded the sentence imposed after the first trial. On appeal, a panel of the Superior Court of Pennsylvania affirmed the judgment of sentence. The Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal.

Petitioner then filed a petition for writ of habeas corpus, which was denied by the federal district court. On appeal, an *en banc* court of appeals ruled that the instructions of the trial court were unconstitutional under *Francis v. Franklin*, 471 U.S. 307 (1985), but on a divided vote determined that this error was harmless. The majority opinion gave no weight to controlling cases of this Court or to the facts which under this Court's recent opinion in *Yates v. Evatt*, 111 S.Ct. 1884 (1991), make clear that the constitutional error was not harmless.

REASONS FOR GRANTING THE WRIT

The Decision of the Court Below Finding Harmless Error in A Jury Instruction Allowing Consideration of an Unconstitutional Presumption Is In Direct and Irreconcilable Conflict with This Court's Ruling in *Yates v. Evatt*, 111 S.Ct. 1884 (1991) and with the Decisions of Other Courts of Appeals.

Last Term, in *Yates v. Evatt*, 111 S.Ct. 1884, this Court articulated the standards to be applied in determining whether the use of unconstitutional presumptions in a court's instructions to the jury could be harmless error. The Court made clear that the burden of demonstrating harmless error was a demanding one: the prosecution must show beyond a reasonable doubt that the evidence "was of such a compelling force as to show . . . that the presumptions must have made no difference in . . . the verdict." *Id.* at 1895.

In this case, the court of appeals treated *Yates* as if this Court did not mean what it said. The court of appeals found harmless error even though the prosecutor had conceded in the trial court that the evidence on the issue of intent was closely contested and, therefore, that the error could not be considered harmless. The court of appeals also ignored the one objective fact that unequivocally demonstrated that the jury in fact relied upon the unconstitutional presumption: the jury specifically requested reinstruction on the presumption and arrived at a verdict shortly after being reinstructed on the same unconstitutional presumption.

In these circumstances, the decision finding the error to be harmless is irreconcilable with *Yates* and is in direct conflict with the decisions in other courts of appeals. This

Court should grant certiorari and reverse the judgment of the court below to ensure that the mandate of *Yates* and the fundamental due process protections it is designed to protect are not ignored.

A. The Unconstitutional Instructions.

The court below correctly determined that the trial court violated petitioner's rights under *Francis v. Franklin*, 471 U.S. 307 (1985) when it instructed the jury that it could find the critical issue of intent to kill to be established by use of dual presumptions. The trial court in its main charge to the jury stated:

> "We should at this point also tell you the intentional, unlawful, and fatal use of a deadly weapon against a vital part of the body *gives rise to the presumption of fact that an intent to kill existed.*
>
> This is a presumption of fact based on common knowledge that such use is almost certain to be fatal. *Every person is presumed to intend the natural and probable consequences of his act,* but being a presumption of fact it may be rebutted by other circumstances in this case; and whether it is so rebutted is a question for you to decide." N.T. 722. (Emphasis added).

After eight hours of deliberation the jury sent a question to the court asking the trial judge "to explain intent in regards to the hitting of a vital organ." N.T. 758. Quite obviously, the jury was focused on the issue of intent to kill and wanted to know if they could consider the presumptions in their deliberations. The response by the

court was unambiguously unconstitutional. The court stated:

> Then you inquired as to the intent in regard to the hitting of a vital organ; and if you will recall, I told you in the charge on first-degree murder that the intentional, unlawful, and fatal use of a deadly weapon against a vital part of the body gives rise to the presumption of fact that an intent to kill existed. This is a presumption of fact based on common knowledge that such use is almost certain to be fatal.
>
> Every person is presumed to intend the natural and probable consequences of his act; but being a presumption of fact, it may be rebutted by other circumstances in the case, and whether it is so rebutted is a question for you to decide. N.T. 768-69.
>
> . . .
>
> "[I]t is proper for you to apply this presumption if you see fit and if it is not rebutted in any other way." N.T. 769-770.

The violation in this case is even more egregious than that in *Franklin*. In *Franklin*, the only objectionable charge referred to one intending the natural and probable consequences of his acts. Here, the same language was used ("every person is presumed to intend the natural and probable consequences of his act"), but as a corollary the court also focused on specific factors in the case, instructing that the use of a deadly weapon on a vital part of the body gives rise to the presumption of fact that an intent to kill existed. The instructions did far more than "suggest to the jury a possible conclusion to be drawn if the state proves predicate facts." *Franklin*, at 314. The jury

was permitted to find the existence of intent by applying either of these plainly impermissible presumptions.

B. Harmless Error.

1. The Irreconcilable Conflict with *Yates v. Evatt*

Given the unmistakable evidence that the jury in this case actually relied on the unconstitutional presumption and given the sharp conflict in the evidence on the issue of intent, the decision below if allowed to stand imperils the mandate of *Yates*.

In *Yates* this Court ruled that a court in determining whether error is harmless in an unconstitutional presumption case must first decide whether the jury was free to consider all facts concerning the issue addressed by the presumption (here, intent to kill) or whether the instruction limited their consideration to the predicate facts.

Assuming that the instruction permitted the jury to consider all of the evidence on intent,[1] *Yates* mandates a

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[1] In this case, the jury may well have believed that as to the "deadly weapon" presumption it was not free to consider any facts other than the predicate for the presumption. The instruction stated that the intentional use of a deadly weapon on a vital part of the body gave rise to a presumption of intent. The trial court then stated that "every person is presumed to intend the natural and probable consequences of his act," but that this presumption may be rebutted by other circumstances. N.T. 768-69. Thus the jury was invited to differentiate between the two presumptions in terms of whether they could be rebutted. Clearly, if the jury believed that the deadly weapon presumption did not allow consideration of other evidence, there can be no harmless error.

finding of prejudicial error. In its post-trial brief in the trial court the prosecution stated:

> "The Commonwealth acknowledges that the element of intent to kill certainly was at issue in the trial. Furthermore, while there was ample evidence to convict, it would not be realistic to characterize the evidence as overwhelming in light of the conflicting psychiatric testimony. Consequently, the Commonwealth does not argue the issue of harmless error."
>
> *Commonwealth's Memorandum of Law in Opposition to Post Verdict Motions*, p. 8.

This concession was well taken. This was a close, vigorously contested case on the issue of criminal intent. The defense presented substantial evidence demonstrating the lack of any criminal intent through lay and expert witnesses, including the testimony of petitioner that he did not intend to kill. As Judge Mansmann stated in her dissent:

> The defense expert witness, Dr. Emanuel Tanay, testified that he believed Rock's acts of setting fire to his home and murdering the two victims did not constitute behavior "acceptable" to Rock, and was "contrary to his past history and contrary to his wishes." Dr. Tanay further opined that Rock acted "as if he was responding to some delusions . . . reenacting something." Tr. at 505. There was ample evidence to support the factual components of Tanay's theory. Rock had demonstrated great interest and pride in his home, purchasing items for landscaping and paying his mortgage just hours before setting his home on fire. The record shows an absence of any evidence that Rock had previous brushes

> with the law or that he harbored any motive beyond his general frustration with his life. Indeed, there was no evidence that Rock harbored a particular malice toward these specific victims.
>
> Rock testified that he unsuccessfully ransacked his home and shed looking for a magazine pouch, then doused the structures with gasoline and set them on fire in a state of agitation and confusion. Tr. 421-22. Rock further testified that after hearing shots and explosions that frightened him, he ran to the rear of his burning home and began shooting "at anything that moved." Tr. 427-29. He expressly denied any knowledge of shooting, or intent to shoot, at people. N.T. 429.

The court below ignored this compelling evidence of lack of intent and thereby violated the cardinal precept of *Yates* that all evidence in the record be considered and that harmless error be found only if the prosecution's evidence was so overwhelming that beyond a reasonable doubt the jury did not rely on the presumption.

Most important, there is no need to speculate as to whether this jury was influenced by the unconstitutional charge: the record shows that the jury had a serious and abiding question as to whether criminal intent could be proved by the presumptions. As noted above, after approximately eight hours of deliberation, the jury requested reinstruction with respect to "intent" and "the hitting of a vital organ." N.T. 766.[2] Given the court's

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[2] Earlier, the jury had sent a note to the Court, stating: "One, *intent to kill*, two was it wrong; [and then there is a line

(Continued on following page)

erroneous response to this question it was no great surprise that the jury deliberated only an additional hour before returning its verdict. In *Yates*, this Court ruled that since there is no way to determine the subjective processes of the jury, an objective test would be applied: the evidence of intent must be so overwhelming that a court can say beyond a reasonable doubt that the presumption was not at all significant. Here, by contrast, the subjective process is clear; the jury by its own questions manifested an express reliance on the presumption. And this Court has recognized that where a jury requests clarification on the law and the verdict is delivered speedily after an erroneous supplemental charge it "would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide." *Bollenbach v. United States*, 326 U.S. 607, 611-12 (1946). *See also, Rogers v. United States*, 422 U.S. 35 (1975).

The court below ignored *Bollenbach* and its progeny. See, e.g., *Francis v. Franklin, supra* at 326 (request for reinstruction shows that evidence was far from overwhelming); *Bright v. Williams*, 817 F.2d 1562, 1565 (11th Cir. 1987) (same); *Hill v. Mahoney*, 927 F.2d 646 (1st Cir. 1990); *Arroyo v. Jones*, 685 F.2d 35 (2d Cir. 1982). This Court should make clear that where undisputed evidence

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(Continued from previous page)

to show it is incorporated] a *weapon capable of killing, shooting at a vital organ*." N.T. 750 (Emphasis added). Plainly the jury had focussed directly on the issue of the weight that should be given to the evidence of shooting at a vital organ.

of a jury's consideration of the unconstitutional presumption is presented, there can be no harmless error under *Yates*.

2. The Conflict in the Courts of Appeals

The decision below is also in direct conflict with the decisions of the other courts of appeals. The lower federal courts have faithfully applied a rigorous harmless error standard – consistent with the decision in *Yates* – that requires a showing that the jury must not have relied on the presumption. See, e.g., *Bright v. Williams, supra; Hernandez v. Rayl,* 944 F.2d 794 (10th Cir. 1991); *Bowen v. Kemp,* 832 F.2d 546 (11th Cir. 1987) (en banc); *Godfrey v. Kemp,* 836 F.2d 1557 (11th Cir. 1988); *Hill v. Maloney, supra; Merlo v. Bolden,* 801 F.2d 252 (6th Cir. 1986), cert. denied, 107 S.Ct. 1358 (1987); *Gunn v. Newsome,* 851 F.2d 1294 (11th Cir. 1988) (en banc); *Hyman v. Aiken,* 824 F.2d 1405 (4th Cir. 1987); *Alexander v. Foltz,* 838 F.2d 140 (6th Cir. 1988).

In *Bright v. Williams, supra,* as in the case at bar, the jury requested reinstruction on the unconstitutional presumption. That factor was found to be strong evidence that the jury relied on the presumption. Here, the court below gave no weight at all to this factor.

In *Hernandez v. Rayl,* 944 F.2d 794 (10th Cir. 1991), the Court found no harmless error in a presumption instruction of intent even though the defendant claimed self-defense. The court recognized that self-defense normally is an intentional act, but correctly ruled that as long as

intent to kill is fairly contested by the defendant, the presumption is prejudicial.

In *Bowen v. Kemp*, 832 F.2d 546 (11th Cir. 1987) (en banc), the court addressed the harmless error issue in a case remarkably similar to the case at bar. The court correctly recognized that cases involving insanity defenses will generally implicate as well the issue of criminal intent. The court further stated that a court "cannot infer overwhelming evidence of intent directly from the physical sequence that resulted in the victim's death." *Id.* at 551. Also relevant is the "defendant's state of mind," *id.* and, where the evidence showed that the defendant was suffering from some "form of mental disorder . . . there was a legitimate jury issue as to . . . state of mind." *Id.* at 551 n.14

In *Godfrey v. Kemp*, 836 F.2d 1557 (11th Cir. 1988), defense psychiatric testimony demonstrated that the defendant had suffered from a "dissociative attack" (Rock, too, presented evidence of a "dissociative reaction," N.T. 499). In this condition a person may "cut off from his mind awareness of his surroundings," and such a condition amounts to "substantial evidence" of lack of intent. *Id.* at 1563. Accordingly, any *Franklin* error is not harmless beyond a reasonable doubt.

In *Dick v. Kemp*, 833 F.2d 1448 (11th Cir. 1987), the court rejected a harmless error argument that was based on the defendant's statement to the police that the victim "started towards me and I got scared and I pulled the trigger." *Id.* at 1451. The state argued that the statement concedes intent, but the court responded that the act of shooting may have been "voluntary in the manner since

he pulled the trigger, but not voluntary in the sense that the act was synonymous with an intent to kill." *Id.* at 1452. The court stated:

> Rather than showing that the unconstitutional instructions were harmless because there was no issue of intent left to decide, the state succeeds in showing precisely the opposite. The state's interpretation of Dick's statement reveals a presumption about the consequences of acts that is sufficiently strong to make Dick's reaction to Rider tantamount to an intent to kill. Rather than mere surplusage, the jury instructions were more likely an exacerbation running counter to the intent of *Francis*. The point in *Francis* was to preserve a jury assessment of the defendant's state of mind, not to supplant the assessment with inferences about acts. The jury must presume innocence until the prosecution proves intent. *Id.*

The court below gave two reasons for finding the error harmless. First, it concluded that since the trial judge instructed the jury that it could not use the presumption unless it determined that petitioner was sane and that he had "intentional[ly] . . . use[d] . . . a deadly weapon against a vital part" of the victim's body there was no danger that the presumption played a part since the predicate facts so strongly indicative of intent to kill. Of course, as the dissent below pointed out this argument rests on the highly questionable assumption that the jury understood the term "intentional" to modify both the use of a deadly weapon (i.e., as opposed to an accidental discharge) *and* on a vital part of the body. The jury's question about this instruction casts grave doubts on this interpretation. If the jury was as certain as the court

below that there was an intentional use of the weapon on a vital part of the body, it would not have requested reinstruction, since intent would be clearly proven. The jury asked this question precisely because they were uncertain about the presumption and the language used by the court. Moreover, as detailed above, the evidence on intent was strongly rebutted by the defense, and looked at as a whole could not be deemed overwhelming.

Second, the court of appeals pointed to the convictions for attempted murder and reasoned that the presumptions could not have played a part in those verdicts since the shots did not hit vital parts of the body. However, since the jury was instructed to consider the presumption on these charges as well, it is evident that these verdicts are similarly tainted. And the majority ignored the fact that the trial court gave two presumptions (use of a deadly weapon and every person is intended to intend the natural and probable consequences of one's act) and told the jury to apply both in its determinations on the attempted murder charges. Plainly, the jury could have relied on the second presumption to find the intent for attempted murder. The jury's verdicts on attempted murder do not provide any support for the harmless error theory.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GARY LEE ROCK,	:	
Petitioner	:	CIVIL NO. 88-2011
vs.		
LEROY S. ZIMMERMAN, and FRANKLIN COUNTY DISTRICT ATTORNEY,	:	
Respondents	:	

MEMORANDUM AND ORDER

(Filed Jan. 22, 1990)

Before the Court is Gary Lee Rock's petition for a writ of habeas corpus, filed through his counsel pursuant to 28 U.S.C. § 2254. The petition requests that we set aside Rock's 1985 Pennsylvania state court convictions on two counts of first degree murder, four counts of attempted murder and two counts of aggravated assault because of alleged constitutional infirmities in the jury charge on the elements of intent and diminished capacity and because Rock believes that he was improperly denied a change of venue or venire. The petition also alleges that Rock was denied due process by the trial court's imposition of sentences in excess of those he received after his original convictions in 1978 on basically the same charges.

We have thoroughly reviewed the record of the trial proceedings, Rock's petition and supporting brief, and the Commonwealth's response thereto. For the reasons which follow, we shall deny the writ.

BACKGROUND

On July 2, 1977, Gary Lee Rock set fire to his Franklin County, Pennsylvania house and a nearby shed. As neighbors and Fayetteville volunteer firefighters approached the blaze, the Petitioner fired rifle shots which struck and killed both a neighbor, Wilbur Brookens, and James Cutchall, the chief of the local volunteer fire department. The Petitioner also fired shots which injured several other firemen, while other individuals were subjected to the gun fire but not wounded. After the shootings, Rock fled into the woods near his burning house, but was later apprehended, arrested and charged with two counts of first degree murder, seven counts of attempted murder and one count of arson.

Shortly afterward, two Franklin County Public Defenders were appointed to represent Rock. Prior to trial, those attorneys obtained both a demurrer on one attempted murder count and a dismissal of the arson charge. On May 9, 1978, a jury trial commenced on the remaining charges in the Court of Common Pleas of Franklin County, the principal issue at trial being whether Rock was legally sane during the tragic shooting spree. After three days of proceedings, the jury convicted the Petitioner of two counts of first degree murder and six counts of attempted murder. Post trial motions were denied. The court, through then President Judge George C. Eppinger, issued the Petitioner a life sentence on both of the First degree murder convictions and three to eight year terms in prison for each of the six attempted murder convictions. Judge Eppinger directed the murder sentences to run concurrently, and ordered that the attempted murder sentences run consecutively to each

other and concurrently with the first degree murder sentences.

The Supreme Court of Pennsylvania affirmed the judgment in a per curiam decision. *Commonwealth v. Rock*, 494 Pa. 128, 430 A.2d 1150 (1981). Rock, through his present counsel, David Rudovsky, Esquire, then filed a petition for a writ of habeas corpus in this Court and alleged the following in support thereof: (1) a Commonwealth witness violated the Petitioner's Fifth Amendment rights by commenting upon his post arrest silence; (2) the trial court committed an error of constitutional proportion when it refused to grant a motion to change venue or sequester the jury in light of prejudicial pre-trial publicity; (3) the trial court deprived the Petitioner of his *Miranda* rights by allowing the introduction of certain of Petitioner's statements; (4) the trial court issued constitutionally defective jury instructions; and (5) trial counsel was ineffective. After detailed consideration, we denied the writ on the basis of the first four enumerated claims, and ordered an evidentiary hearing on the fifth. *Rock v. Zimmerman*, 543 F.Supp. 179 (M.D.Pa. 1982). After two hearings on the matter, we granted the writ on the grounds that trial counsel were ineffective for failing to seek suppression of certain evidence and failing to offer evidence of the Defendant's good character. *Rock v. Zimmerman*, 586 F.Supp. 1076 (M.D.Pa. 1984).

Rock stood trial for a second time in January of 1985, and placed into issue whether he was insane or of diminished capacity on July 2, 1977 and whether he had the requisite intent to kill or injure the victims. The jury rejected both defenses, deliberating ten hours before

returning convictions on two counts of first degree murder, four counts of attempted murder and two counts of aggravated assault. Judge Keller, who presided at the second trial, sentenced the Petitioner to two consecutive life sentences for the first degree murders and ordered that an aggregate of 26 to 60 years on the other convictions to run concurrently.

After the second trial court denied Rock's extensive post trial motions, he appealed his convictions without success in the Pennsylvania appellate system. The Petitioner, currently incarcerated at the State Correctional Institution at Huntingdon, Pennsylvania, now continues his challenge to those convictions by way of the habeas corpus petition before this Court.

DISCUSSION

I.

Rock' first argument is that the trial judge's jury charge on the issue of intent impermissibly shifted the burden of proof as to that element of the crime of murder away from the state in violation of his right to due process. He vigorously contests the constitutional vitality of these portions of Judge Keller's initial instructions on intent to the jury:

> We should at this point also tell you the intentional, unlawful, and fatal use of a deadly weapon against a vital part of the body gives rise to the presumption of fact that an intent to kill existed.
>
> This is a presumption of fact based on common knowledge that such use is almost certain

> to be fatal. Every person is presumed to intend the natural and probable consequences of his act, but being a presumption of fact it may be rebutted by other circumstances in this case; and whether it is so rebutted is a question for you to decide.

Rock also takes exception to the content of this reinstruction on intent, issued by the judge upon a request from the jurors after they had deliberated for several hours:

> Then you inquired as to the intent in regard to the hitting of a vital organ; and if you will recall, I told you in the charge on first degree murder that the intentional, unlawful, and fatal use of a deadly weapon against a vital part of the body gives rise to the presumption of fact that an intent to kill existed. This is a presumption of fact based upon common knowledge that such use is almost certain to be fatal.
>
> Every person is presumed to intend the natural and probable consequences of his act; but being a presumption of fact, it may be rebutted by other circumstances in the case, and whether it is so rebutted is a question for you to decide.

A.

One of the most fundamental tenants of American jurisprudence is that in order to prevail in a criminal proceeding the state must prove the defendant guilty of every element of the offense charged beyond a reasonable doubt. In *In re Winship*, 397 U.S. 358 (1970), the Supreme Court made it clear that a criminal conviction will not pass constitutional muster unless the prosecution satisfies this burden completely, stating that "[l]est there remain

any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. *See Patterson v. New York*, 432 U.S. 197, 210 (1977); *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). The purpose of this principle, made applicable to evidentiary presumptions in a jury charge in *Sandstrom v. Montana*, 442 U.S. 510 (1979), is "to insure that only the guilty are criminally punished". *Rose v. Clark*, 478 U.S. 570, 580 (1985).

In *Francis v. Franklin*, 471 U.S. 307 (1984)[1], the Supreme Court held that language in a jury instruction on the element of intent is constitutionally defective when it creates a "mandatory presumption" which effectively relieves the state of its burden of persuasion beyond a reasonable doubt of the intent element of a murder charge. *Franklin, supra* at 314. *See Sandstrom, supra* at 510, 520-524; *Patterson, supra* at 210, 215; *Mullaney v. Wilbur*, 421 U.S. 684, 698-701 (1975). The *Franklin* Court noted, though, that instruction language which "requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved" creates a "permissive inference" which does not necessarily deny the accused due process. *Franklin, supra* at 314. The court ruled that a permissive inference in a jury charge only amounts to a constitutional infraction when

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[1] The issue in *Franklin* was "almost identical to that before the [Supreme] Court in *Sandstrom*." *Francis v. Franklin*, 471 U.S. at 313.

the "suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Id.*, at 314-315; *See Ulster County Court v. Allen*, 442 U.S. at 157-163.

Consequently, our "threshold inquiry in ascertaining the constitutional analysis applicable to the [jury instruction complained of] is to determine the nature of the presumption it describes," *Franklin, supra* at 313-314, quoting *Sandstrom, supra* at 514, i.e., whether the charge Rock contests amounted to a mandatory presumption or a permissive inference. In this regard, the dispositive issue is "whether a reasonable juror *could* have understood the [contested language] as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the state had proved the predicate acts." *Franklin, supra* at 316.

Considering the challenged instructions in isolation, we believe that they could have led a reasonable juror to believe that the state was relieved of its burden to prove Rock intended to kill Brookens and Cutchall upon proof of the fact that Rock deliberately used a deadly weapon and in using that weapon, struck vital organs in both victims. The specific language to which the Petitioner objects, both in the main charge and the supplemental instructions, was compulsory in nature and did not inform the jurors that they were free to accept or reject the presumption created. Indeed, a portion of the challenged language is similar to that which the Supreme Court found "undeniably created an unconstitutional burden-shifting presumption with respect to the element

of intent" in *Franklin*.[2] *Id.*, at 318. We find, therefore, that the contested segments of the judge's charge to the jury violated the constitutional mandate of the *Sandstrom/ Franklin* line of cases by creating what a reasonable juror may have construed as an impermissible burden shifting presumption with regard to the element of intent.

B.

Our determination that *Sandstrom/Franklin* error occurred in the dissected portion of the jury charge to which Rock has objected does not put this inquiry at an end. We are mindful of the "well-established proposition that a single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge", *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973), citing *Boyd v. United States*, 271 U.S. 104, 107 (1926); *Humanik v. Beyer*, 871 F.2d 432, 441 (3d Cir. 1989). This principle is of "fundamental importance in determining whether the instructions [to which Rock is opposed] in the present case violated due process". (Respondent's Memorandum, p.5). Therefore, we are compelled to examine the entire jury charge to determine whether "other instructions might explain the particular infirm language to the extent that a reasonable juror

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[2] The constitutionally infirm *Franklin* language read:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

could not have considered the charge to have created an unconstitutional presumption." *Franklin, supra* at 315, citing *Cupp v. Naughten, supra* at 147.

The Respondents point to the following segments of the instructions in support of the proposition that, when considered in its entirety, the jury charge is not violative of due process:

> You are not bound by any opinion you might think the attorneys or the judge have expressed concerning guilt or innocence, credibility of witnesses, weight of evidence, facts proven by the evidence, or inferences to be drawn from those facts. . . .
>
> If however your judgment of what the evidence proves and inferences to be drawn from the facts established to your satisfaction differs from what is suggested by the attorneys or by the court you will follow your own judgment and not the suggestion of anyone else, including the attorneys or the judge.
>
> Furthermore, a defendant is presumed innocent throughout the trial and unless and until you conclude based on an impartial consideration of the evidence that the Commonwealth has proved him guilty beyond a reasonable doubt, and of course that applies as to each of the matters you will be considering. . . .
>
> It is the Commonwealth that always has the burden of proving each and every element of the crime charged . . . and that the defendant is guilty of that crime or crimes beyond a reasonable doubt. . . .

> The person accused of a crime or crimes is not required to present evidence or present anything in his own defense. . . .
>
> If a person intends to kill, the intention is to be gathered from all the circumstances surrounding the act as from the character and type of weapon used, from the part of the body on which it is to be used, and what was said at the time or immediately after by the person committing the act, and all of the circumstances that throw any light on the intention.
>
> In other words, members of the jury, you may if you see fit, find an intent to kill existed from the fact that the defendant did use the .300 Savage rifle; that he did fire it; that he did strike Mr. Brookens in the chest and blow out his heart; and did fire it again and struck Chief Cutchall in the skull and damaged his brain causing death in each case. These things you may, if you see fit, consider in determining an intent to kill.
>
> However, intent, like any other matter, may be proved by circumstantial evidence. That is by inferences that reasonably may be drawn from all of the facts and circumstances including the defendant's acts and conduct.

The Respondents argue that these instructions either countervail or sufficiently clarify the possibly defective segments of the charge to a degree which survives scrutiny under *Franklin* and its progeny. We agree.

Both the facts of this case and the jury instructions stand in stark contrast to those in *Franklin*. Accused of murder, the defendant in *Franklin* testified in his defense that the handgun which killed the victim discharged the

fatal round accidentally when the victim argued with the defendant and then closed a door in his face. Testimony at the trial corroborated this theory, as there was evidence which demonstrated conclusively that the fatal bullet travelled through the door before it entered the victim's body. As it was in the trial of this case, the sole issue at the *Franklin* trial was criminal intent. But the challenged instructions in *Franklin* – that "acts of a person of sound mind and discretion are presumed to be the products of the persons will," and that an individual "is presumed to intend the natural and probable [sic] of his acts" – directed the jury to presume that the only contested portion of that trial (intent to kill) was established upon proof of the fact that the defendant had slain the victim. The jurors, however, were never "told that they had a choice, or that they might infer [a particular] conclusion," *Franklin, supra* at 316, quoting *Sandstrom, supra* at 515. Rather, they were compelled to apply the presumption as stated by the judge in spite of the fact that there was testimony offered at the trial that plainly could have led a reasonable juror to believe that the gun was fired accidentally.

At his trial, Rock relied on the defenses of insanity and diminished capacity. The challenged instructions in Rock's case did nothing to undermine those defenses. Furthermore, the jury was instructed to find the Petitioner sane beyond a reasonable doubt and not suffering from diminished capacity before it could even consider whether he possessed the intent to kill required for a murder conviction. Unlike the *Franklin* case, the jurors here were told immediately after the defective portions of the instructions that they had the option of accepting or rejecting any presumption suggested. The jurors were

told that they *could* infer, *if they saw fit*, that an intent to kill existed from the intentional, unlawful and fatal use of a deadly weapon upon a vital part of the victim's body, not that they were obligated to do so. The judge made it clear that the application of this presumption was not a mandatory procedure, but rather, an act of discretion predicated upon the appropriateness of the inference in light of the facts presented during the course of the trial. *See Dickey v. Lewis*, 859 F.2d 1365, 1370 (9th Cir. 1988). At many times during the course of the jury charge Judge Keller underscored the government's burden of proving sanity, lack of diminished capacity and every other element of its case beyond a reasonable doubt.

In contrast to the *Franklin* defendant, Rock did not have the burden of disproving an essential element of the crime with which he was charged. *See Brooks v. Kemp*, 762 F.2d 1383, 1388 (11th Cir. 1985); *Davis v. Kemp*, 752 F.2d 1515, 1519-20 (11th Cir. 1985). We also find that the presumption itself – that the jury might infer an intent to kill existed from fact that the defendant caused a fatality by deliberately using a deadly weapon upon the vital organs of the victims – was not one that defies reason and common sense in light of the proven facts before the jury. *See* Part I., Section C., *infra*. Consequently, when taken in the context of the jury charge as a whole, our opinion is that the challenged instructions do not offend due process.

C.

In an additional argument, Rock maintains that the judge's supplemental instructions regarding the defense

of diminished capacity were constitutionally invalid because the jurors were not instructed that they could not consider the intent presumptions before the Commonwealth had disproved the presence of diminished capacity beyond a reasonable doubt. This contention is likewise without merit.

In considering this argument, we remain mindful that specific portions of the trial court's jury instructions may not be looked at alone to determine whether a constitutional violation has occurred. Rather, as we review a challenge to a segment the jury charge, it is critical to remain sensitive to the instructions in their entirety. *See Cupp v. Naughten*, 414 U.S. 141 (1973) and cases cited *supra*.

In his initial instructions to the jury, Judge Keller gave the following charge on diminished capacity:

> Obviously, you cannot find him guilty of first-degree murder unless you are satisfied beyond a reasonable doubt that the defendant's claim [of diminished capacity] is wrong and that he was indeed capable of the specific intent to kill. As we have said frequently, the Commonwealth must prove all of the elements of the crimes charged.
>
> Therefore, if the Commonwealth has not proven beyond a reasonable doubt that the defendant does not suffer from an abnormal mental condition which made him incapable of forming a specific intent to kill, and if the Commonwealth proved beyond a reasonable doubt all the other elements of murder in the first degree then the defendant is entitled to have

> your verdict reduced to murder in the first degree.[3]

After a period of deliberation, the jurors returned three questions, one of which sought an explanation of the difference between murder of the first degree and murder of the third degree where diminished capacity is involved. In relevant part, the judge's answer to this question was as follows:

> The defense of diminished capacity, if found to apply . . . goes to the question of whether or not the defendant had the mental capacity to fully form the specific intent to kill. . . .
>
> Here the defendant asserts that as a result of an abnormal mental condition, he was, at the time of the killing, incapable of fully forming the intent to kill. Obviously, you cannot find him guilty of first degree murder unless you are satisfied beyond a reasonable doubt that the defendant's claim is wrong and that he was capable of the specific intent to kill.
>
> As we have said frequently, the Commonwealth must prove all of the elements of the crime charged. Therefore, if the Commonwealth

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[3] As the Respondents point out, the judge "misspoke when [he] instructed the jury that the verdict could be reduced to murder in the first degree." (Respondents' Memorandum, pp. 21-22, n.4). He clarified this mistake later when he explained to the jury that " . . . I may have made the rather absurd statement that if you find diminished capacity exists, that then the crime would be reduced to first degree murder . . . . [T]hat certainly was error, because . . . [d]iminished capacity has the effect of reducing the crime of murder in the first degree to murder in the third degree." (Exhibit III P, p.744).

> has not proven beyond a reasonable doubt that the defendant does not suffer from an abnormal condition which made him incapable of forming a specific intent to kill, and if the Commonwealth proved beyond a reasonable doubt all of the other elements of murder in the first degree, then he is entitled to have your verdict reduced to guilty of murder in the third degree.
>
> This requires a determination by you that Mr. Rock . . . suffered this mental, abnormal mental condition and that the Commonwealth failed to prove that he had the . . . mental capacity to form the specific intent to kill . . . .

The judge also answered a question regarding intent and the presumptions created by the use of a weapon on a vital organ, (Discussed *supra*), and included this admonition:

> [L]et me also remind you in your deliberations that I used the word intentional use of a deadly weapon against a vital part of the body. Here you have to incorporate in your considerations . . . this legal insanity defense.
>
> Because if Mr. Rock suffered from a mental disease and if he did not know the nature and quality of the act he performed . . . then it could not be intentional. . . . If you find he was legally sane, then it is proper for you to apply this presumption if you see fit and if it is not rebutted in any other way.

Rock contends that the judge's failure to give a similar qualifying instruction with respect to the defense of diminished capacity allowed the jurors to distinguish between the insanity defense and the diminished capacity

defense and permitted them to find that the Commonwealth's burden to prove lack of diminished capacity was shifted to the defense. We disagree with this analysis.

Judge Keller's initial charge on diminished capacity, as well as his reinstructions, made it quite obvious that the Commonwealth had the burden of proving both sanity and lack of diminished capacity beyond a reasonable doubt before the jury could begin to consider any evidence which would support a murder conviction – including the intent presumption contested here. Consequently, we are satisfied that the jury instruction regarding diminished capacity, as a whole, were constitutional.

Furthermore, the Petitioner's argument is inherently flawed, for he contends merely that the jury *could* have found that the Commonwealth had satisfied its burden to disprove diminished capacity beyond a reasonable doubt by using an impermissible presumption. Our inquiry, however, is not concerned with the infinite realm of what is possible, but rather, only what a *reasonable person could* have found in light of the judge's instructions. The instructions that the Commonwealth had to disprove both insanity and diminished capacity beyond a reasonable doubt before the jury could consider evidence of murder were plain, explicit and stated repeatedly. We conclude that a reasonable juror in this case could not have misapplied them.

D.

We hold today that the jury instructions Rock contests are not constitutionally substandard when considered in the context of the entire jury charge, but since we

found the challenged language to be unconstitutional when standing alone, it is appropriate to undertake a harmless error analysis as well. *See Rose v. Clark*, 478 U.S. 570 (1986); *Polsky v. Patton*, No. 88-1772, slip op at 10 (3d Cir. November 27, 1989).

The Supreme Court has identified some constitutional errors which "are so fundamental and pervasive that they require reversal [of a criminal conviction] without regard to the facts or circumstances of the particular case. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1985). For example, denying the defendant assistance of counsel, compelling the accused to stand trial before a biased or financially interested judge or using a coerced confession can never be harmless error because in those situations, the basic trial process has either been aborted or denied altogether. *Rose v. Clark*, 478 U. S. at 578, n.6. *See Jones V. Zimmerman*, 805 F.2d 1125, 1130 (3d Cir. 1986). A criminal defendant, however, is entitled only "to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. at 681 (1985), citing *United States v. Hasting*, 461 U.S. 499, 508-509 (1983); *Bruton v. United States*, 391 U.S. 123, 135 (1968). Consequently, not all trial errors of constitutional magnitude require automatic reversal of a guilty verdict. *Chapman v. California*, 386 U.S. 18, 24 (1967).

A new trial is not necessary when the constitutional error committed is harmless beyond a reasonable doubt[4],

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[4] In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Supreme Court recognized that reversal of a criminal conviction for trial error may have undesirable effects which reach far beyond the litigants involved. The Court noted that the harmless constitutional error doctrine both

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Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 1797 (1988); *Rose v. Clark, supra* at 584, for "[i]t would further neither justice nor the purposes of the *Sandstrom* rule to reverse a conviction in such a case." *Id.*, at 581-582.[5] Constitutional error in a jury instruction is harmless beyond a reasonable doubt when the reviewing court finds "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same." *U.S. v. Clemons*, 843 F.2d 741, 753 (3d Cir. 1988), citing *Pope v. Illinois*, 481 U.S. 497, 503 n.6 (1987).

The undisputed facts of this case and, therefore, those necessarily found by the jury, were as follows. On

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recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States v. Nobles*, 422 U.S. 225, 230 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.").

Id., at 681.

[5] In *Pope v. Illinois*, 481 U.S. 497 (1987), the Supreme Court stated that "[t]o the extent that cases prior to *Rose* may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, see, e.g., *Cabana v. Bullock*, 474 U.S. 376, 384 (1986), after *Rose*, they are no longer good authority." *Id.*, at 504, n.7.

the morning of July 2, 1977, Gary Lee Rock woke up, went to town and purchased forty rounds of .300 caliber rifle ammunition and two boxes of 12-gauge shotgun shells, purportedly for the purpose of hunting ground-hog. Rock, an ex-Marine, subsequently returned home and fired several practice rounds from a scope-equipped .300 Savage rifle at a paper target he positioned on a tree stump behind his house. The paper target was later found to have had one bullet hole in the upper left hand corner and four bullet holes placed in the center within one inch of each other.

Soon afterward, Rock poured gasoline in several rooms of his house and a shed nearby, ignited the gasoline and waited with his weapons, staring at the blaze. Moments later, he fired the single rifle shot that killed an approaching Wilbur Brookens by piercing his heart. Rock also shot and killed James Cutchall with a bullet to the head as Cutchall was attempting to radio for help. Rock wounded several other emergency personnel with gunfire, then he fled into the woods dressed in battle fatigues and carrying both a rifle and a shotgun. When he was later surrounded by law enforcement officials in the mountains behind his home, Rock asked "How many did I kill, how many did I hurt?". An expert rifleman,[6] Rock admitted at hit trial that the scope on the weapon used in the killings was sighted in properly. He has never

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[6] The Petitioner testified at trial that the Marine Corps grades its marksmanship trainees in three categories: expert, sharpshooter and marksman. According to the Petitioner, "expert would be the top" in order of proficiency. (Exhibit 3H, p.379).

claimed that he fired the gun accidentally, but rather, that he "kept shooting and shooting" "at everything that moved".

On the basis of these facts, which were wholly undisputed, we can not see how the jury could have rejected the defenses of insanity and diminished capacity and not found that intent to kill existed in this case. We reach this conclusion in spite of the fact that portions of the jury instructions as well as segments of the reinstructions issued to the jury contained constitutionally imperfect language. In light of the overwhelming evidence of guilt established and unrefuted at the trial, we are confident that the verdict would have been the same even if the jury had never heard the erroneous instructions.

Rock cites the decision in *Bright v. Williams*, 817 F.2d 1562 (11th Cir. 1987) for the proposition that a constitutionally defective reinstruction on a disputed trial issue precludes a finding that the erroneous charge was harmless beyond a reasonable doubt. In *Bright*, the Eleventh Circuit Court of Appeals found *Sandstrom/Franklin* error in a jury charge with regard to intent[7] and went on to characterize the harmless error inquiry as "whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury

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[7] The charge in *Bright* was as follows:

> I charge you that the actions of a person of sound mind and discretion are presumed to be the products of a person's will, that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but that these presumptions may be rebutted.

would have found it unnecessary to rely on the presumption." *Bright, supra* at 1565, citing *Connecticut v. Johnson,* 460 U.S. 73, 97, n.5 (1983) (Powell, J., dissenting). In response to this harmless error inquiry, the Circuit Court was "unable to say that the erroneous charge was harmless beyond a reasonable doubt" because when the jury returned after deliberating for a period of time and asked for a reinstruction on the element intent, the trial court, for the second time, gave the illegal charge.

We must respectfully disagree with the reasoning of the *Bright* Court[8] because the Supreme Court's opinion in *Pope v. Illinois,* 481 U.S. 497 (1987) – decided a month before *Bright* but not referred to in that decision by the Eleventh Circuit – makes it clear that the fact that a jury may have had an impermissible instruction on a contested element of a charged offense in mind when it considers that element is "not a reason to retry the defendant if the facts that the jury necessarily found established guilt beyond a reasonable doubt. *Id.* at 503. In *Pope* the Supreme Court recognized that the fact that a jury could have had an unconstitutional presumption in mind when it considered an essential element of a crime was

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[8] This Court is certainly not bound by the decisions or the reasoning of the eleventh Circuit. *See Bonham v. Dresser Industries Inc.,* 424 F.Supp. 891, 896 (W.D.Pa. 1976). Ironically, we find it appropriate to simultaneously reject the *Bright v. Williams* rationale and direct the petitioner's attention to the Eleventh Circuit's judgment in *Corn v. Zant,* 708 F.2d 549 (11th Cir. 1983) that when examining the constitutional propriety of jury instructions, the reviewing court should be mindful that "[w]hile the analysis in [other] opinions is helpful, the cases [may not be] dispositive because each set of instructions differs in length and phraseology . . . ". *Id.,* at 549.

not cause to reverse a conviction "if the facts that the jury necessarily found established guilt beyond a reasonable doubt." *Pope, supra* at 503. Quoting from the *Rose* opinion, the Court said:

> [w]hen a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. *Connecticut v. Johnson*, 460 U.S. 73, 96-97 (1983) (Powell, J., dissenting). In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury.

Id., quoting *Rose v. Clark*, 478 U.S. at 580-581. (emphasis in original). *See Carella v. California*, ___ U.S. ___, 109 S.Ct. 2419, 2423 (1989) (Scalia, J., concurring).

Assuming again, as we are constrained to do, that the jury followed the judge's instruction to determine that Rock was not insane or suffering from diminished capacity before it went on to consider evidence of intent to kill, we believe that the predicate facts the jury was instructed to find before it could rely upon the intent presumption in this case are, in combination, such conclusive proof of intent that the jury could not have found the predicate facts and also not found the existence of intend.[9] Shy of an outright confession, we can think of no stronger evidence of intent to kill than that the defendant, though he

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[9] Before the jurors could even consider applying the presumption, the judge's instructions required that they determine Rock had deliberately, (intentionally) and without a legal excuse (unlawfully) fired a rifle shot into a vital body part of each of the victims that caused their death.

had no legal justification, picked up a rifle, sighted it in, then deliberately discharged a bullet from the weapon into a vital organ of another human being.

Assured that Rock was not prejudiced in any way by the trial court's charge to the jury, we now proceed to his remaining contentions.

II.

The Petitioner argues that the trial judge's refusal to grant a change of venue in the face of pervasive pre-trial publicity and his failure to exclude certain venire for cause violated his Sixth Amendment[10] right to a trial by an impartial jury trial. *See Irvin v. Dowd*, 366 U.S. 717 (1961). For the following reasons, we find that these arguments are without merit.

A.

Since a motion for change of venue is directed to the sound discretion of the trial court, the denial of such a motion will not be reversed absent an abuse of that discretion. *Martin v. Warden, State Correctional Facility*, 653 F.2d 799, 804 (3d Cir. 1981); *Commonwealth v. Pursell*, 508 Pa. 212, 220-221 (1985). In order to determine whether an

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[10] In relevant part, the Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ".

abuse of discretion has taken place regarding venue, a federal court reviewing a challenge to a state court conviction ordinarily conducts a two-part inquiry. *See Yount v. Patton*, 710 F.2d 956, 968 (3d Cir. 1983), reversed on other grounds *Patton v. Yount*, 467 U.S. 1025 (1984). Initially, the court must determine "whether the circumstances surrounding [the] [p]etitioner's conviction were so inherently prejudicial that a violation of his constitutional right to trial by an impartial jury can be presumed." *Rock v. Zimmerman*, 543 F.Supp. 179, 186 (M.D.Pa. 1982). When this conclusion is not apparent, the court should then determine from the totality of circumstances whether the petitioner's trial was rendered fundamentally unfair by the trial court's refusal to change venue, *Murphy v. Florida*, 421 U.S. 794, 799 (1975); *Rock v. Zimmerman*, 543 F. Supp. at 186-187. The court must decide whether the pre-trial publicity had been "so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has utterly corrupted the trial. *Martin, supra* at 805, citing *Murphy, supra* at 798. Actual prejudice may be established only in "expremely rare circumstances". *See Murphy, supra* at 803.

Two frequently cited cases in which habeas petitioners have prevailed because their state court convictions were "obtained in a trial atmosphere that had been utterly corrupted by press coverage" were *Estes v. Texas*, 381 U.S. 532 (1965) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). *Murphy, supra* at 798. In *Estes*, the Supreme Court found that the State of Texas violated the Petitioner's right to due process of law under the Fourteenth Amendment where, in a criminal case of substantial notoriety,

there had been a "bombardment of the community" with radio and television broadcasts from a two-day change of venue hearing which preceded the trial, "during which the original jury panel, the petitioner, the lawyers and the judge were highly publicized." *Estes, supra* at 538. The Court found that the media coverage of the two-day hearing, at which the trial court issued an order permitting television at the actual trial, "emphasized the notorious character that the trial would take and, therefore, set it apart in the public mind as an extraordinary case." *Id.* The Court found significant the fact that four of the jurors who ultimately convicted the petitioner had both seen and heard at least part of the broadcasts of the earlier proceedings. *Id.* These factors played in concert with additional media intrusions to create a "circus atmosphere" in a courtroom "overrun . . . with television equipment." *Murphy, supra* at 799.

In *Sheppard,* the Supreme Court reversed the Ohio second-degree murder conviction of a Cleveland physician, Dr. Sam Sheppard, who was charged with the brutal murder of his wife. The Court found that Dr. Sheppard was victimized by preindictment and pretrial publicity, as well as publicity during the trial, that was both extensive and highly sensational.[11]

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[11] Typical preindictment publicity included: a front-page newspaper interview entitled "DR. SAM: 'I Wish There Was Something I Could Get Off My Chest – but There Isn't' "; a newspaper cartoon of the body of a sphinx with the defendant's head which was captioned: " 'I Will Do Everything In My Power to Help Solve This Terrible Murder' – Dr. Sam Sheppard"; and many other newspaper headlines, a sampling

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Indeed, the record before the Supreme Court contained "five volumes of . . . clippings from each of the three Cleveland newspapers covering the period from the murder until Sheppard's conviction". *Sheppard, supra* at 342. A large percentage of the lurid news printed and broadcast during the nine-week trial did not even originate from courtroom testimony[12], and the Court had strong reason to believe that at least some of this material reached members of the jury. *Id.*, at 357. Even the press itself called into question the appropriateness of the manner in which Sheppard's case was reported. One published story noted:

> "[t]he question of Dr. Sheppard's guilt or innocence still is before the courts. Those who have examined the trial record carefully are divided as to the propriety of the [guilty] verdict. But almost everyone who has watched the performance of the Cleveland press agrees that a fair hearing for the defendant, in that area, would be a modern miracle."

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of which read "Blood is Found in Garage", "New Murder Evidence Is Found, Police Claim", and "Dr. Sam Faces Quiz At Jail On Marilyn's Fear of Him". *Sheppard v. Maxwell,* 384 U.S. 333, 342 (1966).

[12] Examples of facts reported on the case that did not originate from the witness stand were allegations that the defendant deliberately obstructed his wife's murder investigation, that he had to be guilty because he had retained a prominent criminal attorney, that he was a perjurer, that he had sex with many women and fathered an illegitimate child, and that his wife had described him as having a "Jekyll-Hyde" personality. *Sheppard v. Maxwell,* 384 U.S. 33, 356-357 (1966).

Harrison, "The Press vs. the Courts," The Saturday Review (Oct. 15, 1955).

Id., at 356, n.10. Another article referred to in the *Sheppard* opinion which was critical of the trial's press coverage stated that "[a]t this distance, some 100 miles from Cleveland, it looks to us as though the Sheppard murder case was sensationalized to the point at which the press must ask itself if its freedom, carried to excess, doesn't interfere with the conduct of fair trials. Editorial, The Toledo Blade (Dec. 22, 1954)." *Id.*

In both *Estes* and *Sheppard*, the Supreme Court found the circumstances to be so egregious that it presumed a fair trial was rendered impossible. *Also see Rideau v. Louisiana*, 373 U.S. 723 (1963). While we agree with the Petitioner that some of the publicity regarding his case may not have been totally unbiased, the record before us indicates nothing along the order of the poisoned atmosphere that prevailed in either the *Estes* or the *Sheppard* cases. Therefore, we may not presume the Petitioner was denied the right to a fair trial. Rather, we must examine the totality of the circumstances which encompassed Rock's conviction to determine whether he was the victim of prejudice which actually destroyed the possibility of a fair trial. In order to prevail in this regard, the Petitioner must demonstrate that Franklin County was "a community with sentiment so poisoned against [him] as to impeach the indifference of jurors who displayed no animus of their own." *Murphy, supra* at 794.

The gist of the Petitioner's argument is that the pretrial publicity pertaining to his case had such a negative effect upon the attitudes in the local population that it

was impossible for him to receive a trial by a panel of impartial jurors drawn from Franklin County. In support of this contention, Rock has submitted "unrebutted expert evidence concerning juror attitudes, resulting from a survey of qualified jurors in Franklin County", which purports to indicate that 93.7% of those interviewed had "heard of" Rock's case, and that of that group "68% believed Gary Rock to be guilty, 31% could not say, and 1% thought that he was not guilty." (Petitioner's Memorandum, p.21-22). In evaluating this argument, we must say initially that we have grave doubts which are amply supported in the record abut the reliability of the data presented.[13] We need not recount these concerns at length, however, for even if Rock could establish the reliability of the statistical data at issue, the evidence itself does not so clearly mandate a change of venue that we could say the trial court abused its discretion by failing to grant the Petitioner's motion.

The Petitioner also argues that the "pervasive nature of the prejudice against Gary Rock in Franklin County" is demonstrated in the record of the voir dire proceedings. (Petitioner's Memorandum, p.22). Rock maintains that:

> 1. 59 prospective jurors were subjected to voir dire.
>
> 2. Of these, only 12 or approximately 20% stated that they did not have prior knowledge or information about the case. . . . [T]he vast majority not only had heard about the case, but, in addition, knew that the defendant had been

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[13] *See* Respondent's Memorandum, pp.27-33; Exhibit IC, Transcript of Proceedings for Change of Venue.

> convicted of first degree murder in his previous trial.
>
> 3. Of the 49 prospective jurors who were asked whether they had an opinion as to whether Gary Rock was guilty, 14 or 29% stated they had a fixed opinion of guilt.

Id., at 22-23. The Respondent does not quarrel with these figures, but argues instead that the record in this case does not support a change of venue since it in no way indicates a situation where the pool of potential jurors had a fixed or irrevocable opinion as to Mr. Rock's guilt. We agree with the Respondent.

Beyond a doubt, many of Gary Rock's prospective jurors had heard some information about his case prior to voir dire, largely through news media accounts. But it is well-settled that complete ignorance about a case is not a prerequisite to serving as a juror. Moreover, "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 554 (1976).

The Third Circuit has ruled that "[t]he constitution does not guarantee trial by jurors totally oblivious to events unfolding from day to day in the community in which they live." *Martin, supra*, at 806. Indeed, the judiciary has long recognized that the media rarely fails to make some impression regarding important cases on even those who are best qualified to serve as jurors.[14] *Id.*, citing

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[14] The hardship created by prejudicial pre-trial publicity has a history that parallels the growth of news media. In *United States v. Williams*, 586 F.2d 464 (5th Cir. 1978), the Fifth Circuit

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Irvin v. Dowd, supra at 722. No one disputes that even individuals who have previously formed an opinion regarding the defendant's guilt or innocence may be qualified to sit as a juror. The controlling principle in this area of the law, as stated by the Supreme Court, says that

> [t]o hold that the mere existence of any preconceived notion as to the built or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*

Irvin v. Dowd, supra at 722. (emphasis added).

In our opinion, the majority of the potential jurors examined for Rock's trial – even those who had some prior knowledge of the case – had relatively vague and dispassionate opinions about the defendant's guilt. This is understandable, in our point of view, for by the time of Rock's second trial, more than seven years had passed since the incident which resulted in his arrest and subsequent conviction. "That time soothes and erases is a

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approached this issue from an historical perspective, noting that the Pennsylvania Supreme Court speculated early on that newspaper accounts of important cases might result in the facts of those cases being decided by jurors whose "dark minds have never been smitten by the rays of intelligence." *Id.*, at 467, quoting *O'Mara v. Commonwealth*, 75 Pa. 424, 428 (1874). We pray that the wisdom of those who have occasion to make law in this area renders the *O'Mara* court's statement more hyperbole than prophesy.

perfectly natural phenomenon, familiar to all." *Patton v. Yount*, 467 U.S. 1025, 1034 (1984). Indeed, a significant number of the prospective jurors had no fixed opinion regarding guilt or innocence, and none of the jurors actually empaneled in the Rock case admitted to having an opinion of guilt one way or the other. By way of comparison, this case does not even barely approach the situation which confronted the trial court in *Irvin v. Dowd, supra* at 727,[15] where almost ninety percent of prospective jurors who were asked if they had an opinion regarding guilt answered in the affirmative and eight of the twelve actual jurors thought the petitioner was guilty.

For the reasons stated, we deny Rock's contention that he was improperly denied a change of venue.

B.

Rock also contends that he was improperly denied challenges for cause for two prospective jurors. The Petitioner insists that Blaine C. Barnhart was incompetent to serve on his jury since he had served in the military reserves with James Cutchall. He also argues that Phyllis Keefer should have been excused for cause because her husband was distantly related to Cutchall, "submit[ting] that any familial or personal relationship with the victim

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[15] This case appears to be the only Supreme Court case to rely on the grounds of actual prejudice resulting from the refusal to change venue as a means to reverse a criminal conviction.

of a crime establishes bias as a matter of law, notwithstanding a juror's statement that he/she would be fair." (Petitioner's Memorandum, p. 25). We disagree.

Due Process is denied only when the "likelihood or appearance" of bias is manifest in a judicial proceeding. *Peters v. Kiff*, 407 U.S. 493, 502 (1972). "Thus a defendant cannot, consistent with due process, be subjected to trial by an insane juror, *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912), by jurors who are intimidated by the threat of mob violence, *Moore v. Dempsey*, 261 U.S. 86 (1923), or by jurors who have formed a fixed opinion about the case from newspaper publicity, *Irvin v. Dowd*, 366 U.S. 717 (1961)." *Id.*, 501-502. It also goes without saying that some relationships with the victim may be so intimate that bias can be presumed despite a prospective juror's assertions of impartiality, an obvious example being where a murder victim's wife or husband is called as a prospective juror in the trial of the deceased spouse's alleged killer. But this is clearly not a case in which we can presume juror bias. *See United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976). Neither Barnhart nor Keefer indicated that they would not be able to render an impartial verdict. While we are well aware that a juror's assurances that he or she can set aside personal opinions regarding guilt or innocence and render an impartial verdict can not "be dispositive of the accused's rights," *Murphy v. Florida*, *supra* at 800, upon a careful review of the record, we find that neither Mr. Barnhart's familiarity with Mr. Cutchall[16]

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[16] The judge and Mr. Barnhardt had the following exchange during voir dire:

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Q. (Judge Keller) Did you know the deceased Wilbur Brookens or James Cutchall?

A. (Mr. Barnhart) I knew James Cutchall.

Q. Does the fact that you knew Mr. Cutchall in any way interfere with your ability to well and truly try this case and render a verdict based solely upon the evidence presented, the arguments of counsel, and the charge of the Court?

A. No, sir.

Q. Do you know any members of either the Brookens family or the Cutchall families; and by that I mean wives, children, parents, grandparents, brothers, sisters, aunts, uncles, first cousins, or in-laws of the same degree?

A. I know Jim's brother, Jeff.

Q. And so I ask you the same question again. Would that in any way affect your ability?

A. No.

Subsequently, Rock's attorney, Mr. Rudovsky, and Mr. Barnhart participated in this exchange:

Q. (Mr. Rudovsky) Mr. Barnhart, you stated that you were a friend of Mr. Cutchall?

A. (Mr. Barnhart) James Cutchall.

Q. Died in this incident?

A. Yes, sir.

Q. How long had you known him?

A. Several years. I guess we were in the Reserves together.

Q. In Reserves together?

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A. Yes, sir.

Q. So you served together?

A. Yes.

Q. For how long?

A. Several years. I was in the Reserves for 23 years; and during that period, I don't know, three or four years, maybe we were together.

Q. Aside from your Reserve duty with him, did you see him?

A. No, we didn't socialize together or anything, no.

Q. You mentioned that you also know his brother.

A. Jeff, yes. He works in the same building I do at Letterkenny. He was also in the Reserves with me.

Q. You are a friend of his?

A. More or less, yes.

Q. And you've known him for how long?

A. Fifteen years, maybe.

Q. Pretty good friend of his?

A. Not really. We talk a little bit about this or that or whatever, but we've never gone anywhere together or anything like that.

Q. Have you talked to him about this case?

A. No.

Q. How did you feel when Mr. Cutchall was shot and killed?

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nor Mrs. Keefer's relationship to Mr. Cutchall, if any,[17] was so close that we should call into question their solid

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A. We weren't close, but I thought we lost a good man; other than that, I don't know.

Q. Having had that feeling, can you state you can be a fair juror to the person accused of killing Mr. Cutchall?

A. I don't know. I don't think it will affect me that much. I say I wasn't close to the gentleman. I always wanted to believe in the lack of fair play, I mean whether or not the gentleman is guilty or not. I think I could go with what I heard today or will hear or whatever.

Q. You say it wouldn't affect you that much. In what way would it affect you if at all? Let me put it this way. If it was a very close decision, would you go over toward conviction because you knew Mr. Cutchall?

A. I don't think I would.

Q. And you would be able to face his brother and continue your same relationship with his brother if you voted to acquit Mr. Rock?

A. I think so.

[17] During voir dire, the following dialogue took place between the judge and Mrs. Keefer:

Q. (Judge Keller) Did you know the deceased, Wilbur Brookens or James Cutchall?

A. (Mrs. Keefer) Okay, Cutchall is distantly related through marriage.

Q. To you?

A. No. I don't know him personally.

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assurances that they could render an impartial verdict in Rock's case. At any rate, the voir dire testimony of the

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Q. But I say, he was distantly related through your marriage?

A. Yeah, it's through my husband. He's distantly related to Cutchall.

Q. Do you know about how distant?

A. Cutchall's wife's grandmother and my husband's mother – that would be her aunt, okay.

Q. I see. That is pretty distant, isn't it? Would the fact that you have a distant relationship with Mr. Cutchall in any way affect your ability to well and truly try this case and render a verdict based solely upon the evidence presented, the arguments of counsel, and the charge of the Court?

A. No, I wouldn't have no difficulty.

Q. Do you know any members of either the Brookens or the Cutchall families; and by that I mean wives, children, parents, grandparents, brothers, sisters, aunts, uncles, first cousins, or in-laws of the same degree?

A. No.

Later, questioning on this topic resumed as follows:

Q. How do you know that James Cutchall was a distant relationship – you had a distant relationship with Mr. Cutchall?

A. Because, like, the girls' grandmother, they used to come up to my family's cabin on the Fourth of July.

Q. So when this happened you knew that right away?

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cited jurors clearly does not suffice to overcome what is a strong presumption of correctness we owe the trial court's conclusions. *See Patton v. Yount, supra* at 1040; 28 U.S.C. § 2254(d)(8).

III.

Rock's final argument, based upon the Supreme Court's decision in *North Carolina v. Pearce*, 395 U.S. 711 (1969)[18], is that his due process rights were violated by the imposition of a lengthier sentence after retrial because no facts of record justified the increase in sentence. The Respondents concede that the sentence issued by Judge Keller after the Petitioner's second trial was "substantially harsher" than the original sentence imposed by Judge Eppinger, but argue that *Pearce* is inapplicable here

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A. They were going to come up for the Fourth of July, then they didn't.

Q. So there was going to be some kind of family gathering that weekend?

A. Yes.

Q. That didn't occur because of this accident?

A. Our family got together. It's just that, you know, the Pattersons, you know, they didn't come up.

Q. I understand. Some people didn't come up.

A. Right.

[18] *Pearce* is a rare example of a case which limits the broad discretion in determining appropriate sentences vested in judges and other sentencing authorities. *Wasman v. United States*, 468 U.S. 559, 563-564 (1984).

because Judge Keller did not preside over the first trial. The Respondents are correct.

Rock's argument relies on the teaching in *Peace, supra,* that "the Due Process Clause of the Fourteenth Amendment prevent[s] increased sentences [upon reconviction] when that increase was motivated by vindictiveness of the trial judge." *Texas v. McCullough,* 475 U.S. 134, 137 (1986). "In order to assure the absence of [a vindictive or retaliatory motivation]," the *Pearce* Court stated, "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Pearce, supra,* at 726. "This rule has been read to "[apply] a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence.' " *Wasman v. United States,* 468 U.S. 559, 565 (1984), quoting *United States v. Goodwin,* 457 U.S. 368, 374 (1982).

In *Texas v. McCullough, supra,* the Supreme Court noted that its *Pearce* holding was modified in *Stone v. Powell,* 428 U.S. 465, 482 (1976), a case which limited application of the *Pearce* presumption of vindictiveness to those situations "where its objectives are thought most efficaciously served," *Texas v. McCullough, supra* at 138, i.e., where there is a legitimate basis from which vindictiveness can be presumed. Where a second sentence is involved, and therefore, the presumption of vindictiveness is inapplicable[19], *Pearce* now requires no more than

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[19] As the Supreme Court stated in *Colten v. Kentucky,* 407 U.S. 104 (1972),

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that the second sentence enter a logical, nonvindictive reason for the sentence on the record. *McCullough, supra,* at 140.

Since it is clear from our reading of the relevant supreme court decisions that we may not presume that the second sentencer, Judge Keller, vindictively issued Rock a more lengthy prison term than he had received after his first trial, the Petitioner's sentence must stand if we find a logical nonvindictive reason for the sentence on the record.[20] In our opinion, Judge Keller's explaination of his reasons for imposing the sentence is thoughtful, long on logic and utterly devoid of vindictiveness.[21] The sentence, therefore, must stand.

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> "[i]t may often be that the [second sentence] will impose a punishment more than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [second] trial than that the [first sentence] imposed a lenient penalty."

Id., at 117. *See Texas v. McCullough,* 475 U.S. 134, 140 (1986) (even though the first sentence is less severe than the second, when different sentences involved, a sentence "increase" can not be said to have taken place).

[20] We note that a defendant may always obtain relief from an increased sentence upon reconviction where he can show "actual vindictiveness upon resentencing." *Texas v. McCullough,* 475 U.S. 134, 138 (1986), citing *Wasman v. United States,* 468 U.S. 559, 569 (1984). *See Bordenkircher v. Hayes,* 434 U.S. 357 (1978).

[21] In a supplement to his written opinion which ruled on Rock's post trial motions, Judge Keller outlined the facts of Rock's case as he perceived them:

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A. On the morning of July 2, 1977, the defendant:

1. Purchased two boxes of .300 calibre rifle cartridges at Gale Diehl's Sporting Goods store to augment a box of similar cartridges he had at home for use in groundhog hunting that weekend. (there are 20 cartridges in a box of large calibre shells.)

2. Purchased two boxes of 12-gauge shotgun shells at Nichols Discount Store to be used hunting groundhog or crows.

3. Fired seven or eight rounds from his .300 Savage rifle at a paper target.

B. The rifle was equipped with a rifle scope.

C. The paper target has one bullet hole in the upper lefthand corner of the target and four bullet holes in the center within one inch of each other.

D. The rifle scope required no adjustments.

E. The defendant agreed with the prosecuting attorney that the rifle was definitely sighted in properly.

To anyone unacquainted with rifle marksmanship and hunting, the facts above set forth would have no particular significance. However, to the marksman/hunter defendant's activities on the morning of July 2, 1977 were highly significant, for they were consistent with a marksman/hunter who:

1. Desired to have immediately available a substantial quantity of high-powered rifle ammunition – more than would reasonably be required for groundhog hunting over a long weekend in July.

2. Desired to have his scope sighted large calibre rifle "zeroed in" so it was dead on and the paper target demonstrates that it was.

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For all of the foregoing reasons, the petition for a writ of habeas corpus is denied. An appropriate order is attached.

/s/ Richard P. Conaboy
Richard P. Conaboy,
Chief Judge
Middle District of
Pennsylvania

DATE: 1/22/90

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With these undisputed facts the shots that killed James W. Cutchall and Wilbur Brookens at relatively short range and put two bullet holes in the windshield and one below the windshield and through the dashboard area of a slowly moving fire truck, can hardly be found surprising. When the jury concluded the Commonwealth had proven beyond a reasonable doubt that Gary Lee Rock was not legally insane or suffering from diminished capacity at the time of the shooting, this Court was compelled to the conclusion that the shots that felled Cutchall and Brookens and hit the vulnerable windshield area of the fire truck were carefully and deliberately placed. Contrary to the argument of defense counsel that this was one single extended incident, we found the evidence established beyond a reasonable doubt that the defendant with the skill of a trained marksman picked his targets, aimed his rifle, and squeezed off his shots with deadly accuracy.

We reject the concept that murder and other criminal acts are "cheaper by the dozen" as being morally reprehensible and philosophically unacceptable. We, therefore, respectfully submit the facts as interpreted by this "second sentence" justified the enhanced sentences imposed.

Filed March 24, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-5120

GARY LEE ROCK,

Appellant

v.

LEROY S. ZIMMERMAN; JOHN F. NELSON,
DISTRICT ATTORNEY of Franklin County

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civil Action No. 88-2011)

Argued April 2, 1991

BEFORE: MANSMANN and ALITO,
Circuit Judges, and
O'NEILL, *District Judge**

Reargued November 13, 1991

BEFORE: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN,
GREENBERG, SCIRICA, COWEN, NYGAARD,
ALITO and ROTH, *Circuit Judges*

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* Honorable Thomas N. O'Neill, Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

(Opinion filed: March 24, 1992)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

In this appeal from the district court's denial of relief in a habeas corpus proceeding, Gary Lee Rock asks us to set aside his 1985 Pennsylvania state court convictions on two counts of first-degree murder, four counts of attempted murder, and two counts of aggravated assault.

The judge at Rock's trial attempted to explain to the jury, first, that they should determine whether petitioner had a specific intent to kill by examining all of the circumstances surrounding the death of his victims and, second, that they should infer that he did have such an intent only if those circumstances left no reasonable doubt in their minds on the point. Unfortunately, the judge did not confine himself to saying just that; rather, he chose to speak in terms of a "presumption." As

the Supreme Court has noted both before and after petitioner's trial, the use of the word "presumption" in a charge to a jury in a criminal case is fraught with constitutional difficulty and should be avoided. The post-trial proceedings in this case demonstrate the wisdom of that proposition. We are persuaded beyond a reasonable doubt, however, that the result would have been no different if the trial judge had followed the distinctly preferable course of speaking solely in terms of the drawing of *inferences* from the available evidence.

Rock's petition for *habeas corpus* relief also complains of the trial court's failure to grant a change of venue and of the imposition of graver sentences after his initial sentence was vacated and he was retried. Since we conclude that the sentences Rock is now serving are not constitutionally infirm for any of these reasons, we will affirm the order of the district court.

I.

On July 27, 1977, after setting fire to his cabin and shed, Gary Lee Rock shot and killed Wilbur Brookens and James Cutchall when they came to his aid. He also shot at but failed to kill six members of the Fayetteville volunteer fire department. Although there was conflicting evidence at trial concerning Rock's mental condition on the day of the shootings, there was virtually no dispute about the events of that day and the background of those events.

Rock grew up in Franklin County, Pennsylvania. After a period of service in the Marine Corps, he returned home and, at the time here relevant, lived in a cabin which he had completely renovated in

a rural, wooded area. Rock testified that in the months preceding the shootings, he suffered bouts of depression and anger. On at least one occasion, he considered taking his own life. Rock experienced dissatisfaction with his job, which he referred to as "women's work," and frustration over his inability to secure a promotion. He also was despondent over his failure to develop a lasting relationship with a woman.

On the night before the killings, Rock attended a friend's party where he saw a woman whom he had previously dated. Upset over the fact that she was with another man, Rock left the party, sat in his truck, and cried. He eventually drove home and fell asleep on his couch.

Upon awakening, Rock drove to town and purchased forty rounds of .300 calibre rifle ammunition and two boxes of 12-gauge shotgun shells, purportedly for the purpose of groundhog hunting. Rock was an avid hunter and, as a result of his military training, a certified expert marksman.[1] When he returned home, Rock dressed himself in combat boots and fatigues and fired several practice rounds from his scope-equipped, .300 Savage rifle at a paper target affixed to a tree stump behind his house. The target was later found to have had one bullet hole in the upper left-hand corner and four bullet holes within one inch of each other in the target's center. After sighting his rifle, Rock poured

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1. Rock testified at trial that the Marine Corps assigned three grades to its marksmanship trainees: expert, sharpshooter, and marksman. Rock stated that his "expert" rating "would be the top" proficiency ranking.

gasoline in various rooms of his cabin and shed and set the structures on fire.

Seeing the smoke from the ensuing blaze, Rock's neighbor, Wilbur Brookens, approached the burning home in an apparent attempt to help put out the fire. He died when Rock fired a single bullet from the .300 Savage into his heart. Shortly thereafter, Fayetteville Fire Chief James Cutchall approached the blaze. Rock killed Cutchall with a bullet to the head. A fire truck arrived next on the scene and Rock fired several shots through its windshield, wounding two fire fighters and narrowly missing four others.

Armed with his rifle, shotgun, and ammunition for both weapons, and carrying two canteens, Rock fled into the wooded mountains behind his cabin. When the police apprehended him several hours later, he inquired, "How many did I kill?" At trial, Rock disputed the testimony of one officer that Rock also stated at the scene of his capture, "I saw two fall." (Rock testified that he believed that he was shooting at moving objects rather than people.)

These events led to Rock's conviction in 1978 on two counts of first-degree murder and six counts of attempted murder. Judge Eppinger, who presided over the trial, sentenced Rock to life imprisonment terms for each of the murder convictions. He further imposed on Rock a three-to-eight year sentence for one of the attempted murder counts and five suspended sentences for the remaining convictions. The judge directed that the life sentences run concurrently with each other and consecutively with the attempted murder sentence. The Supreme Court of Pennsylvania affirmed the convictions in a per

curiam opinion. *Commonwealth v. Rock*, 430 A.2d 1150 (1981).

Rock subsequently succeeded in obtaining federal habeas corpus relief based on a finding that he had received ineffective assistance of counsel during this trial. *Rock v. Zimmerman*, 586 F. Supp. 1076 (M.D. Pa. 1984). At his retrial, Rock conceded that he had fired the shots that killed Brookens and Cutchall and injured the other victims. Thus the critical issue before the jury was whether Rock had the requisite state of mind. Rock's defense was twofold. He asked the jury to find him either (1) not guilty by reason of insanity or (2) incapable by reason of diminished capacity of forming a specific intent to kill and thus guilty only of third-degree murder. The Commonwealth, conversely, argued that Rock's actions—purchasing the ammunition, sighting and scoping his rifle, dressing in combat boots and fatigues, setting fire to his house, waiting for the predictable responses of the victims, and asking how many people he had killed—though irrational, evinced deliberate preparation and thus warranted guilty verdicts of first-degree and attempted murder.

Dr. Tanay, the forensic psychiatrist for the defense, testified that at the time Rock fired his rifle he suffered from a "psychotic episode" or "reactive psychosis." Dr. Tanay opined that because of this mental disease, Rock neither understood "the nature and quality of his acts when he was firing" nor knew that he was doing wrong. Tr. 499-500. After explaining the reasons for these opinions at some length, Dr. Tanay's direct examination concluded with the following question and answer:

> Q. Now, Doctor, I ask you if you have an opinion based on a reasonable degree of medical certainty as to whether the cause of the mental disease and defect you have testified to, if Gary Rock had the capacity to form an intent to kill at the time he was firing his rifle?
>
> A. In my opinion, he did not have the capacity to form the intent because of the mental impairment, the mental illness, from which he suffered at the time. The disruption of his mental apparatus precludes the ability to form intent, as I understand that particular legal concept.

Tr. 511-12. At no point in his testimony did Dr. Tanay articulate an opinion or an analysis that would support a conclusion that even if found to be legally sane, Rock might nevertheless have lacked the capacity to form an intent to kill.

Dr. Hume, the prosecution's forensic psychiatrist, agreed with Dr. Tanay that Rock suffered from a mental disease or defect at the time he fired his rifle. Dr. Hume insisted, however, that Rock understood the consequences that would flow from pulling the trigger, that he knew pulling the trigger was wrong, and that he had the mental capacity to form an intent to kill.

In closing argument, defense counsel initially identified two reasons why the defendant should not be convicted of first-degree murder: the failure of the state to prove sanity and the failure of the state to disprove "diminished capacity." Tr. 640. The entire argument which followed, however, was addressed to the state's alleged failure to prove sanity. In the Commonwealth's closing, the prosecutor tacitly acknowledged the existence of a

mental disease or defect, but insisted that Rock's ability to appreciate the consequences of his actions and to distinguish right from wrong had been established beyond a reasonable doubt.

After eight hours of deliberation, the jury asked the trial judge to explain "the difference between murder of the first degree and murder of the third degree with diminished capacity[,] . . . review [the elements] of voluntary manslaughter[,] . . . [and] [e]xplain intent in regards to the hitting of a vital organ." App. 20.

In response, the court gave a supplemental charge which read in relevant part:

> Now, you remember that that is the main difference between murder in the first degree and murder in the third degree. In murder in the first degree there has to be intentional killing; and that is defined, we told you, as lying in wait or willful and premeditated killing. So if there is diminished capacity, and you so find, then that reduces the crime to murder in the third degree, if all the other elements of murder are present.
>
> Here the defendant asserts that as a result of an abnormal mental condition, he was, at the time of the killing, incapable of fully forming the intent to kill. Obviously, you cannot find him guilty of first degree murder unless you are satisfied beyond a reasonable doubt that the defendant's claim is wrong and that he was capable of the specific intent to kill.
>
> As we have said frequently, the Commonwealth must prove all of the elements of the crime charged. Therefore, if the

Commonwealth has not proven beyond a reasonable doubt that the defendant does not suffer from an abnormal condition which made him incapable of forming a specific intent to kill, and if the Commonwealth proved beyond a reasonable doubt all of the other elements of murder in the first degree, then he is entitled to have your verdict reduced to guilty of murder in the third degree.

* * *

Now, I don't know whether this will be of any help to you; but our courts have also told us what diminished capacity is not. I will read that to you. It is not an excuse for anti-social behavior. It is not something that excuses someone who loses their control or judgment under stress or somebody who reacts to stress by violence. I hope that will help you with that particular problem.

Then you inquired as to the intent in regard to the hitting of a vital organ; and if you will recall, I told you in the charge on first-degree murder that the intentional, unlawful, and fatal use of a deadly weapon against a vital part of the body gives rise to the presumption of fact that an intent to kill existed. This is a presumption of fact based on common knowledge that such use is almost certain to be fatal.

Every person is presumed to intend the natural and probabl[e] consequences of his act; but being a presumption of fact, it may be rebutted by other circumstances in the case, and

whether it is so rebutted is a question for you to decide.

So what the law is on the subject is that if Mr. Rock intentionally, without justification, that means lawfully, did use a deadly weapon against a vital part of the body of the victim or victims, then that gives rise for you to consider that there is a presumption of fact that an intent to kill existed. Because we all know that such use is almost certain to be fatal.

However, let me also remind you in your deliberations that I used the word intentional use of a deadly weapon against a vital part of the body. Here you have to incorporate in your considerations and in your deliberations this insanity, this legal insanity defense.

Because if Mr. Rock suffered from a mental disease and if he did not know the nature and quality of the act he performed that he did, namely the use of the rifle and the aiming at a vital part of the body, or if he knew what he was doing but didn't know it was wrong, then it could not be intentional. So we go in a circle, and you have to address your thoughts to the insanity defense.

Did the Commonwealth prove beyond a reasonable doubt that Mr. Rock was legally sane? If you find he was legally sane, then it is proper for you to apply this presumption if you see fit and if it is not rebutted in any other way.

App. 29-32. Immediately following this supplemental charge, Rock's counsel objected to the instruction concerning the "items which [the

court] said would not constitute diminished capacity." App. 34. He further objected to "the instruction with respect to the intentional use of a deadly weapon on a vital part of the body . . . because it shifts the burden of proof from the prosecution to the defense."[2] *Id.* Less than ninety

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2. Defense counsel had also objected to the trial judge's initial instructions on specific intent. These instructions read in relevant part:

> If a person intends to kill, the intention is to be gathered from all of the circumstances surrounding the act . . . .
>
> That is, every inference should be considered by you; and if a person intended to kill, then the presence of that intention shows that the act was willful.
>
> * * *
>
> We should at this point also tell you the intentional, unlawful, and fatal use of a deadly weapon against a vital part of the body gives rise to the presumption of fact that an intent to kill existed.
>
> This is a presumption of fact based on common knowledge that such use is almost certain to be fatal. Every person is presumed to intend the natural and probable consequences of his act, but being a presumption of fact it may be rebutted by other circumstances in the case; and whether it is so rebutted is a question for you to decide.
>
> In other words, members of the jury, you may, if you see fit, find an intent to kill existing from the fact that the defendant did use the 300 Savage rifle; that he did fire it; that he did strike Mr. Brookens in the chest and blow out his heart; and did fire it again and struck Chief Cutchall in the skull and damaged his brain causing death in each case. These things you may, if you see fit, consider in determining whether or not there is an intent to kill.

minutes later, the jury returned guilty verdicts for two counts of first degree murder, four counts of attempted murder, and two counts of aggravated assault. Judge Keller, who presided over the trial, imposed on Rock two consecutive life sentences and directed that they run concurrently with a prison term of 26 to 60 years for the four attempted murder and two aggravated assault convictions.

After exhausting all state court remedies, Rock filed a federal habeas corpus proceeding in which the district court denied relief. A panel of this court issued a judgment reversing the district court. We granted the Commonwealth's subsequent petition for rehearing and vacated the panel's opinion.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 2253. We exercise plenary review over the district court's conclusions of law in this habeas proceeding. *Humanik v. Beyer*, 871 F.2d

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> If you find the existence of an intent to kill, then you must also determine the presumptions of fact that I have just referred to have been rebutted by other circumstances in the case and whether they have been so rebutted is entirely a question for you to decide as the triers of fact.
>
> Now, recall please that in murder of the first degree there must appear from all of the evidence in the case the existence of a fully formed conscious intention to kill, in other words, a specific intent to take life, either from the facts or to be inferred from the facts, or rising out of presumptions as we explained them to you.

App. 7-10. In our view, these instructions do not differ in any material respect from the supplemental instructions. For that reason and because Rock asks us to focus on what the jury last heard, our analysis will focus primarily on the supplemental instructions.

432, 435 (3d Cir.), *cert. denied*, 493 U.S. 812 (1989).

II.

Before turning to our assigned task of resolving the federal constitutional issues presented by the foregoing events, it is helpful to understand three concepts of Pennsylvania homicide law. First, an essential element of first-degree homicide in Pennsylvania is that the killing be "intentional." 18 Pa. Cons. Stat. Ann. § 2502(a) (1983). "Intentional killing" in this context means "[k]illing by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing." 18 Pa. Cons. Stat. Ann. § 2502(d) (1983). Rock's trial judge defined "willful, deliberate, and premeditated" as follows:

> A killing is said to be willful when it is intentional. . . . When the mind has formed a full conscious purpose to kill, it is premeditated. When there is time to form the conscious purpose to kill and to select a weapon with which to kill or adopt a plan with which to carry this design into execution, it is premeditated.
>
> * * *
>
> If the circumstances are such to show the intention to kill, that the person considered whether he would take the life of another or not, considered it, reached a conclusion that he would kill, then it is deliberate within the meaning of the phrase to which we have [al]luded.

Tr. 720-21. Since this segment of the judge's charge is unchallenged, we accept this as an

accurate statement of the *mens rea* required by Pennsylvania's first-degree homicide statute.

Second, Pennsylvania subscribes to the classic *M'Naghten* test of insanity. *See* 18 Pa. Cons. Stat. Ann. § 314 (1983). Rock's trial judge thus gave the jury the following definition of insanity:

> The test or definition of legal insanity is this: A person is legally insane if at the time of committing an alleged crime he is laboring under a defective reason from the disease of the mind as not to know the nature and quality of the act he is doing; or if he does know the nature and quality of the act, he does not know that what he is doing is wrong.

App. 15.

Third, Pennsylvania has recognized the so-called "diminished capacity defense" since the state's Supreme Court decision in *Commonwealth v. Walzack*, 360 A.2d 914 (Pa. 1976). Subsequent case law, however, makes it clear that "diminished capacity" is not technically a "defense," but rather a contention that the state is unable to prove one of the essential elements of first-degree murder—deliberation and premeditation—because the defendant is without the mental capacity to carry out a plan or design. As the Supreme Court of Pennsylvania has explained:

> [D]iminished capacity is an extremely limited defense . . . . *Walzack* stands only for the proposition that "psychiatric testimony which speaks to the legislatively defined state of mind encompassing a specific intent to kill is admissible." Thus, psychiatric testimony is irrelevant, under *Walzack*, unless "it speaks to

> mental disorders affecting the cognitive functions [of deliberation and premeditation] necessary to formulate a specific intent." [P]sychiatric testimony . . . [that is] no more (nor less) than testimony as to [a defendant's] irresistible impulses or inability to control himself, and not to his ability to formulate and carry out a plan or design, [is] therefore, irrelevant and inadmissible on the issue of [defendant's] specific intent to kill.

Commonwealth v. Zettlemoyer, 454 A.2d 937, 943 (Pa. 1982) (citations omitted).

III.

The Due Process Clause requires that the State prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Accordingly, a criminal conviction cannot stand unless the jury is instructed that the State must tender evidence which convinces the jury beyond a reasonable doubt of the existence of each element. *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979). Jury instructions that explain the inevitable process of drawing reasonable inferences from the record evidence are entirely consistent with this constitutional mandate and, indeed, highly effective tools in equipping the jury for carrying out its assigned responsibilities. *See Yates v. Evatt*, 111 S.Ct. 1884, 1892 n. 7 (1991)(permissive inference is constitutional so long as the inference it permits would not be irrational). Jury instructions, however, which tell the jury that if satisfied about the existence of a predicate fact, it may assume an essential element of the crime without being satisfied of the

existence of that element beyond a reasonable doubt are another matter entirely. In other words, if a jury is instructed that the State may satisfy its burden by something less than evidence which convinces the jury of each element of the offense beyond a reasonable doubt, the Due Process Clause is violated.

In the context of this case, the most helpful Supreme Court precedent is *Francis v. Franklin*, 471 U.S. 307 (1985). The defendant in *Francis* challenged the following instructions from his homicide trial:

> A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

471 U.S. at 311-12.

The Supreme Court vacated the defendant's conviction, reasoning as follows:

> The portion of the jury charge challenged in this case directs the jury to presume an essential

element of the offense—intent to kill—upon proof of other elements of the offense—the act of slaying another. In this way the instructions "undermine the factfinder's responsibility at trial, based on evidence adduced by the State to find the ultimate facts beyond a reasonable doubt." *Ulster County Court v. Allen*, *supra*, at 156 (emphasis added).

The language challenged here differs from *Sandstrom*, of course, in that the jury in this case was explicitly informed that the presumptions "may be rebutted."

* * *

An irrebuttable or conclusive presumption relieves the State of its burden of persuasion by removing the presumed element form the case entirely if the State proves the predicate facts. A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional.

471 U.S. at 316-17.

The Court further held that the concluding sentence in the above-quoted portion of the charge did not cure the constitutional problem, *inter alia*, because "language that merely contradicts and does not explain a constitutionally infirm

instruction will not serve to absolve the infirmity." 471 U.S. at 322. In such a situation, a "reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." 471 U.S. at 322.

With this background, we turn to the present case. We focus initially on the specific language challenged, but our inquiry does not end there. 471 U.S. at 315. As the Court recently noted in *Estelle v. McGuire*, 112 S.Ct. 475 (1991), "[i]t is well established that [an] instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Id.* at 482 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). We must examine therefore the entire charge and record to determine whether other instructions might explain the particular infirm language to the extent that there was not a "reasonable likelihood" that the jury understood the charge to create an unconstitutional presumption.[3] *Id.* at 4019.

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3. Prior to *Estelle*, there was some ambiguity as to the appropriate standard of review for jury instructions. The Court first adopted the "reasonable likelihood" standard in *Boyde v. California*, 494 U.S. 370, 380 (1990). In two later opinions, the Court appeared to endorse an arguably different standard. *See Cage v. Louisiana*, 111 S.Ct. 328, 329 (1990) ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole"); *Yates v. Evatt*, 111 S.Ct. at 1892 ("We think a reasonable juror would have understood the [instruction] to mean . . ."). In *Estelle*, the Court "disapprove[d] the standard of review language in *Cage* and *Yates*, and reaffirm[ed] the standard set out in *Boyde*." 112 S.Ct. at 482 n.4.

A.

Rock challenges the following portion of the supplemental jury charge:

> [T]he intentional, unlawful, and fatal use of a deadly weapon against a vital part of the body gives rise to the presumption of fact that an intent to kill existed. This is a presumption of fact based on common knowledge that such use is almost certain to be fatal.
>
> Every person is presumed to intend the natural and probabl[e] consequences of his act; but being a presumption of fact, it may be rebutted by other circumstances in the case, and whether it is so rebutted is a question for you to decide.
>
> So what the law is on the subject is that if Mr. Rock intentionally, without justification, that means lawfully, did use a deadly weapon against a vital part of the body of the victim or victims, then that gives rise for you to consider that there is a presumption of fact that an intent to kill existed. Because we all know that such use is almost certain to be fatal.

On their face, these instructions relieved the State of a portion of its burden of proving each element beyond a reasonable doubt. The jury was here told that once the State proved the intentional use of a deadly weapon against a vital body part, the law presumed deliberation and premeditation unless other evidence showed their absence. The court instructed that the existence of the predicate fact "gives rise to the presumption" and that "[t]his *is* a presumption of fact." Moreover, the court's

explanation of the rationale for the presumption, i.e., that "[e]very person is presumed to intend the natural and probabl[e] consequences of his act,"[4] reinforces precisely the message of the instructions censured in *Francis*.

Here as in *Francis*, the State stresses that the presumption was described as a rebuttable one. For the reasons explained by the Court in *Francis*, the fact that the presumption was said to be rebuttable makes it no less objectional from a constitutional perspective.

While we thus believe that the principles announced in *Francis* are applicable here as well, it is important to stress that the presumption described in *Francis* is a far different and potentially more prejudicial one than the presumption described to the jury in this case. In *Francis*, the victim had slammed his front door in the defendant's face while the defendant was holding a gun. The gun discharged and the bullet passed through the door before striking and killing the victim. The defendant testified that the gun had discharged accidentally. As the Court explained, the predicate fact in the challenged portion of the jury instructions was that the defendant did an act which resulted in the death of another (i.e., "the act of slaying another") and

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4. Rock argues that the court's instructions involved two presumptions: one arising from the intentional use of a deadly weapon against a vital body part and one arising from any act of the defendant. In context, we believe a reasonable juror could only have understood the charge to convey a presumption arising from use of a deadly weapon. The court's references to the "natural and probable consequences" of an act and "common knowledge" served to explain the rationale for this presumption.

the fact to be presumed was that the defendant intended that death (i.e., "intent to kill"). 471 U.S. at 316. Moving from this predicate fact to this presumed fact was a very material aid to the State in carrying its burden of proof since, in practical effect, it required the jury to reject the accidental discharge theory unless the defendant could point to evidence that established it.

Here the predicate fact was that the defendant formed an intent to shoot a deadly weapon at vital organs of Brookens and Cutchall. The fact to be presumed was that the defendant formed and executed an intent to kill them. Because instances in which an individual forms an intention to use a deadly weapon against a vital body part of another *without* intending to kill that person are at best exceedingly rare in human experience, a presumption of this kind will rarely be of significant benefit to the State. As we will see hereafter, the presumption clearly was of no benefit to the State in the circumstances of this case. Nevertheless, this portion of the charge was constitutionally infirm because it instructed the jury to assume an element of the offenses charged if the jury found the predicate fact to exist and no other evidence contradicted the presumed element.

B.

Having determined that the challenged instructions isolated from their context were constitutionally infirm, we turn to examine the charge in its entirety. *Francis*, 471 U.S. at 322. The Commonwealth asserts that both the general instructions given to explain to the jury the concepts of presumption of innocence and

reasonable doubt and the trial court's specific instructions with respect to intent sufficiently explain the erroneous instructions in a manner consistent with the Constitution. We disagree.

1.

Both the initial and supplemental charges contained general instructions relative to the State's burden of proof and the defendant's presumption of innocence.[5] These instructions,

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5. In its initial charge, for example, the trial court instructed the jury as follows:

> If, however, your judgment of what the evidence proves and the inferences to be drawn from the facts established to your satisfaction differs from what is suggested by the attorneys or by the Court, you will follow your own judgment and not the suggestion of anyone else, including the attorneys or the Judge.
>
> * * * *
>
> Furthermore, a defendant is presumed innocent throughout the trial and unless and until you conclude, based on a careful and impartial consideration of the evidence, that the Commonwealth has proven him guilty beyond a reasonable doubt; and of course, that applies as to each of these matters that you will be considering.
>
> It is not the defendant's burden to prove that he is not guilty. Instead, it is the Commonwealth that always has the burden of proving each and every element of the crime charged, or crimes charged, and that the defendant is guilty of that crime or crimes beyond a reasonable doubt. The person accused of a crime or crimes is not required to present evidence or prove anything in his own defense.

Tr. 692. In the supplemental charge, the court stated: "As we have said frequently, the Commonwealth must prove all of the elements of the crime charged." Tr. 767.

however, "do not dissipate the error in the challenged portion of the instructions." *Francis*, 471 U.S. at 320. The instructions fail to cure the constitutionally defective presumption for two reasons. First, as in *Francis*, these general instructions are not rhetorically inconsistent with the specific instructions on intent which create a burden-relieving presumption. *Francis*, 471 U.S. at 319; *Sandstrom*, 442 U.S. at 518-19 n. 7. As the Court explained in *Sandstrom*, "[t]he jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." 442 U.S. at 518-19 n.7. Second, we believe it far more likely that when considering the evidence regarding Rock's intent the jury applied the instructions specifically directed to that subject matter rather than the more general instructions. *See Humanik*, 871 F.2d at 442 ("we believe it far more likely that the jurors when considering the evidence regarding mental disease or defect applied the instruction specifically directed to that subject matter than the more general charge.").

2.

As we have noted, the court in its supplemental charge attempted to restate the challenged presumption in a portion of the charge which commences with the clause "so what the law is on the subject" and which characterizes the presumption as something for the jurors "to consider" and apply if they "see fit." App. 31-32. We agree with the Commonwealth that the introductory language to this segment of the charge would indicate to the jury that it was about

to hear an explanation of what had gone before. We also agree that this segment of the instructions suggested to the jury that it was not required to apply the presumption even if it found the predicate facts to exist beyond a reasonable doubt. This, however, does not solve the problem. While these phrases indicate that the presumption is not mandatory, they provide no criteria as to when the presumption should or should not be applied; consequently, it is impossible to determine whether the jury did or did not employ the presumption in deciding that the State had carried its burden of proof with respect to *mens rea*. Accordingly, we cannot say that the corrective language in the supplemental instructions cured the charge's constitutional defects.

Nor can we agree with the Commonwealth when it insists that the two charges, taken as a whole, simply instructed the jury that it could infer an intent to kill from all of the facts. In our view, neither the supplemental nor the initial instructions can fairly be read to communicate such a message. As for the supplemental instructions, they contain no explicit or implicit reference to inferring an intent to kill from the facts surrounding the shootings. It is true that the original instructions on intent to kill directed the jurors to consider "every inference" and informed them that "intention is to be gathered from all of the circumstances surrounding the act." Nevertheless, the trial judge's concluding remark on the subject made clear that the jurors had *alternative* means of satisfying the requirement that the Commonwealth prove beyond a reasonable doubt that Rock intended to kill Brookens and Cutchall. In the judge's words, "a specific intent

to take life [was] to be inferred from the facts, *or* rising [sic] out of the presumptions as we explained them to you." App. 10 (emphasis added). Where the trial court offers the jury two approaches, one of which is unconstitutional, and it is impossible to determine whether the jury took the unconstitutional path, a conviction cannot stand in the absence of a determination that the error was harmless beyond a reasonable doubt.

IV.

Constitutional error in a jury instruction will not require a reversal of a criminal conviction if "it appears 'beyond a reasonable doubt that the error did not contribute to the verdict obtained.'" *Yates v. Evatt*, 111 S.Ct. at 1892 (quoting *Chapman v. California*, 386 U.S 18, 24 (1967)). To say that an instruction to apply an unconstitutional presumption did not "contribute" to a jury's verdict is not to say that the jurors were totally unaware of the presumption, but rather, to find that the erroneous instruction was unimportant in relation to the other evidence considered by the jury independently of the presumption. *Yates*, 111 S.Ct. at 1893. The test, then, is "whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption." *Id.* at 1893-94. Accordingly, we ask: Given the undisputed evidence and what the jury concluded based on the charge's errorless instructions, is it clear beyond a reasonable doubt that the jury would have reached the same results if properly instructed regarding intent to kill?

In conducting our analysis, we "adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions." *Francis*, 471 U.S. at 324 n. 9.

A.

Once again we note the limited scope of the challenged presumption. By its own terms, the presumption could play no role in the jurors' deliberations unless and until they concluded that there had been an "*intentional* . . . use of a deadly weapon against a vital part of" the victims' bodies. App. 30 (emphasis added). The trial judge took pains to emphasize this point with his admonition, "let me also remind you in your deliberations that I used *the word intentional* use of a deadly weapon against a vital part of the body." App. 31 (emphasis added). He went on to specifically point out that this meant the presumption would not apply unless the state had carried its burden of proving beyond a reasonable doubt that the act of aiming and shooting at a vital body part was the act of a sane person:

> [I]f Mr. Rock suffered from a mental disease and if he did not know the nature and quality of the act he performed . . . , namely the use of the rifle and the aiming at a vital part of the body, or if he knew what he was doing but didn't know it was wrong, then it could not be intentional.

App. 31.

In light of these instructions, we know that if the jury gave any weight to the impermissible presumption, it must have first concluded beyond a reasonable doubt (1) that Rock was capable of

forming a specific intent to aim his high-powered rifle at a vital organ of Brookens and Cutchall, (2) that he actually formed that intent, and (3) that he acted on it. Thus, we know, *inter alia*, that the jury could not have used the impermissible presumption without rejecting Rock's testimony that he was shooting at "moving objects" rather than at people.

Moreover, because of the above-quoted instruction concerning the relationship between the presumption and the sanity issue, we also know that the jury could not have relied upon the impermissible presumption without having first found Rock sane.[6] Thus, we may take as a given in our harmless error analysis that Rock understood the consequences of firing a deadly weapon at Brookens' heart and Cutchall's head and that he knew it was wrong to do so.

Rock's only other contention was that he suffered from diminished capacity. The situation with respect to this contention differs somewhat from the situation with Rock's insanity contention because there was no instruction expressly directed to the relationship between the presumption and diminished capacity,[7] and

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6. The record provides other clear assurance of the jury's rejection of Rock's insanity defense. The court's charge included a mandate that the jury return a verdict of not guilty by reason of insanity on all counts if the state failed to prove sanity beyond a reasonable doubt. App. 737. The fact that the jury returned no such verdict establishes that the state carried its burden on this issue.

7. Rock objected after the supplemental charge to the court's failure to expressly address the relationship between the presumption and the diminished capacity defense. Although it might have been helpful for the court to do so, the court's

because the defense never articulated for the jury a theory of diminished capacity independent of its theory of insanity. Nevertheless, we can say with confidence that the government secured no assistance with respect to this issue from the impermissible presumption.

As we have noted, the court's description of the predicate fact provides assurance that the presumption could not have been applied unless the jury was satisfied beyond a reasonable doubt that Rock had the capacity to formulate and carry out an intent to shoot his gun at the vital organs of the victims. We are unable to conceive of a situation in which a person would have this capacity and would fully understand the consequences of such firing but would nevertheless lack the required capacity to formulate an intention to kill. More important, neither Rock's psychiatrist nor his counsel has been able to posit such a situation, and nothing in this record suggests any reason why a rational jury would be moved to conceive of one. To the contrary, the undisputed evidence provides overwhelming confirmation of the natural and

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omission falls far short of a due process violation. The court gave an explanation of the diminished capacity issue that Rock has not challenged as unconstitutional. The fact that the court also charged on the presumption and illustrated its application by reference to the defendant's insanity defense takes nothing away from that explanation. Conversely, the existence of a diminished capacity issue provides no reason to believe that the jury applied the presumption, in violation of its terms, without first being satisfied beyond a reasonable doubt of the predicate fact. Thus, so far as the charge is concerned, we believe the sole remaining issue is whether the charge concerning the challenged presumption was harmless error.

compelling inference to be drawn when a sane person intentionally shoots at the heart or head of another—the inference of an intent to kill. Rock's purchase of ammunition, his sighting his rifle, his setting fire to his house, his taking cover and waiting in the woods, his lethal discharge of his rifle, and his flight all speak eloquently to the fact that he purposefully planned the killing of his victims and therefore about his capacity to do so. Thus, the undisputed facts establish beyond peradventure that this was not a case in which the defendant was unable to fully formulate a purposeful scheme. On the contrary, this was a paradigm case of the willful, deliberate, and premeditated killing referred to in the Pennsylvania statute as killing by "lying in wait."

The overwhelming character of the evidence that Rock, if sane, intended to kill Brookens and Cutchall is reflected by the absence of any alternative explanation in the briefing and argument on his behalf. No alternative explanation was tendered to the jury or suggested in the briefing before this court. Rock's counsel did submit at oral argument that Rock may have intended to frighten Brookens and Cutchall away from the burning cabin. This theory, however, falls woefully short of raising a reasonable doubt on the record of this case. When an expert marksman sights a high-powered rifle to assure its accuracy, fires a shot directly into the heart of another, sees the first victim fall, remains under cover, fires a second shot directly into the head of a second victim, still remains under cover, renews firing at others who appear thereafter, flees, and when captured, asks how many people he killed, the scare hypothesis is simply an untenable one.

This analysis alone would support a finding beyond any reasonable doubt that the jury would have returned the same verdict had it never heard the impermissible presumption. The record provides even more assurance, however, of the harmlessness of the trial judge's error.

B.

The evidence at trial showed that the fire truck which arrived at the scene after Rock had shot Brookens and Cutchall carried six fire fighters. Robert Monn, the driver, and William Kady sat in the truck's front seat. Scott Reichenback and Richard Hade sat behind them in the jump seat. Two other fire fighters rode on the back of the truck.

As the truck approached, Rock fired several bullets through its windshield. Other bullets passed near the truck and its occupants. One bullet wounded Reichenback in the arm. Another either grazed or caused glass or metal fragments to graze Monn's arm. None of the other firemen suffered injuries as a result of the shootings.

The jury found Rock guilty of attempted murder with respect to all four of the fire fighters seated in the front and jump seats. It also found Rock guilty of aggravated assault with respect to the two fire fighters who rode on the back of the truck.

In Pennsylvania, attempted murder requires proof of intent to kill. *Commonwealth v. Griffin*, 456 A.2d 171, 178 (Pa. Super. Ct. 1983). Consequently, the trial judge in this case instructed the jury that in order to find Rock guilty of attempted murder, it would have to find that he acted "with the intent to commit the crime of murder." App. 728. Because the jurors found Rock

guilty of attempting to murder Monn, Kady, Reichenback, and Hade, we know that they must have determined that Rock intended to kill all four men—of whom two sustained arm wounds and two suffered no injuries.

The trial judge's instructions regarding attempted murder mentioned no impermissible burden-relieving presumption. The court did refer generally to the instructions on murder, stating:

> You have just heard the crimes of murder defined to a considerable extent and their elements explained. So it is not necessary that I repeat that again, and you will be able to determine whether the defendant's conduct evidenced an intent to commit that crime. . . .

Tr. 729. Even if we were to assume that this general reference to the murder instructions led the jurors to consider the infirm presumption during their deliberations on the attempted murder charges, it is clear that the presumption could not have affected their verdicts.

As noted above, by its own terms, the presumption could play no role in the jury's deliberations unless the Commonwealth established to the jury's satisfaction that Rock had formed and executed an intent to fire a deadly weapon against a vital body part. Because Rock did not use a deadly weapon against the vital body parts of the men whom he was convicted for having attempted to murder, the predicate facts necessary to give rise to the presumption were not established. Thus, assuming, as we must, that the jury followed the trial court's instructions, the presumption could not have led the jury to

conclude that Rock attempted to murder Monn, Kady, Reichenback, or Hade.

Since the jury found without the aid of an impermissible presumption that Rock intended to kill two men who were wounded in the arm and two men who sustained no injuries at all, it is apparent that the jury would have reached the same conclusion regarding Brookens and Cutchall's deaths even if the objectionable portions of the murder instructions had been eliminated. We fail to see how a rational juror could have inferred from the evidence that Rock intended to kill the four men who received minor wounds or no wounds but did not intend to kill the two men whom he shot in the heart and head. Thus, it is clear beyond a reasonable doubt that the objectionable portions of the jury instructions did not affect the first-degree murder verdicts.

V.

Rock's second contention on appeal concerns the trial court's denial of his motion for a change of venue. Rock argues that the adverse publicity surrounding his trials compelled a venue change and that the trial court's refusal to grant his motion violated his Sixth Amendment right to a trial by an impartial jury.[8]

Where media or other community reaction to a crime or a defendant engenders an atmosphere so hostile and pervasive as to preclude a rational trial process, a court reviewing for constitutional error

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8. Our standard of review for a state trial court's finding of juror impartiality in a federal habeas proceeding is "manifest error." *Mu'Min v. Virginia*, 111 S.Ct. 1899, 1907 (1991) (citing *Patton v. Yount*, 467 U.S. 1025, 1031 (1984)).

will presume prejudice to the defendant without reference to an examination of the attitudes of those who served as the defendant's jurors. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963). The community and media reaction, however, must have been so hostile and so pervasive as to make it apparent that even the most careful *voir dire* process would be unable to assure an impartial jury. *United States v. De Perl*, 778 F.2d 963, 972 (3d Cir. 1985); *see Dobbert v. Florida*, 432 U.S. 282, 303 (1977) (refusing to presume juror impartiality "in the absence of a 'trial atmosphere utterly corrupted . . . by press coverage'") (quoting *Murphy v. Florida*, 421 U.S. 794, 798 (1975)). Such cases are exceedingly rare. *De Perl*, 778 F.2d at 972.

In the absence of a showing of an "utterly corrupt" trial atmosphere, the defendant, in order to demonstrate a violation of his right to an impartial jury, must establish that those who actually served on his jury lacked a capacity to reach a fair and impartial verdict based solely on the evidence they heard in the courtroom. *Patton v. Yount*, 467 U.S. 1025, 1035 (1984) (citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)); *De Perl*, 778 F.2d at 972; *Martin v. Warden, Huntingdon State Correctional Institute*, 653 F.2d 799, 805 (3d Cir. 1981). The fact that jury members may have been exposed to press reports or other community reaction concerning the case and even the fact that they may have formed a tentative opinion based on that exposure will not establish a constitutional violation if the trial court has found, with record support, that each of the jurors was able to put aside extrinsic influences.

A.

Rock's trial court concluded that the publicity preceding his second trial had not created a community atmosphere so hostile and pervasive as to preclude a fair trial. That conclusion is amply supported in the record. Although there was extensive adverse publicity and community interest in Rock's case, both reached their peaks prior to Rock's first trial—four years before jury selection for the second trial. From the date of Rock's sentencing after the first trial until his conviction was overturned, a period of 41 months, the local media in the Franklin County region published or broadcast a total of three stories relating to Rock's case. During the three-month period between the reversal of the conviction and the start of the second *voir dire*, the region's two papers carried a total of thirteen articles and the local radio stations reported an aggregate of eleven news stories. Nothing in the record suggests that these news accounts were unfair or sensationalistic. Nor does Rock argue that the media attention was the product of police or prosecutorial initiative. In short, the record does not reveal a "barrage of inflammatory publicity immediately prior to [Rock's] trial" which would give rise to a presumption of juror prejudice. *See Yount*, 467 U.S. at 1033 (quoting *Murphy v. Florida*, 421 U.S. 794, 798 (1975)).

In addition to the media attention given his case, Rock relied on survey data as evidence of community attitudes shortly before his second trial. The survey purported to show that 93.7% of those interviewed had "heard of" Rock's case, and that 68% of that group believed Rock to be guilty.

Like the district court, we have grave doubts as to the reliability of the survey's methodology and results.[9] More importantly, we believe that the transcript of the *voir dire* examination retrospectively confirms that community sentiment did not "utterly corrupt" the trial atmosphere.

"That time soothes and erases is a perfectly natural phenomenon, familiar to all." *Yount*, 467 U.S. at 1034. The effect of the "cooling off" period between the adverse publicity surrounding the killings and the start of Rock's second trial was evident from the *voir dire* testimony. Although most of the veniremen had heard about the case,[10] few could recall more than the most basic facts surrounding the killings. *See, e.g.*, Exhibit IIA, Transcript of Proceedings at 41, 55, 61, 72-73, 105, 138-39, 222, 230, 233-34, 251, 264, 293-94, 349, 352-53, 393, 419-21, 464, 474, 530, 558. Moreover, 70% of those questioned had not formed an opinion as to Rock's guilt. Of this group, only six percent said that they could not set their impressions aside and render a verdict based solely on the evidence introduced at trial. By comparison, in *Yount*, where the Supreme Court rejected a state habeas petitioner's Sixth Amendment claim of jury impartiality, 77% of all of the questioned veniremen stated that they

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9. For example, the survey's questions were phrased and the data were collated such that respondents who thought Rock had shot Brookens and Cutchall but was insane at the time were recorded as believing that Rock was "guilty." Exhibit IC, Transcript of Proceedings For Change Of Venue at 62.

10. Of the 50 veniremen asked whether they had heard about the case, 46 responded in the affirmative.

would carry into the jury box a fixed opinion as to the defendant's guilt. 467 U.S. at 1029.

B.

Turning to the issue of whether Rock has demonstrated actual prejudice—that is, a juror unable to render a fair and impartial verdict based solely on the evidence—we agree with the trial court that Rock's evidence falls far short of the mark.[11] The *voir dire* transcript reveals that none of the seated jurors had formed an opinion as to Rock's guilt prior to the trial. All of the jurors testified that they could render a verdict based solely on the evidence at trial. We also note that eleven of the jurors were seated without challenge by Rock. *See De Peri*, 778 F.2d at 972 (citing as reason for court's rejection of defendant's claim of juror partiality the fact that ten of twelve jurors were seated without challenge). Rock did object to the seating of one juror, but not on the ground that the juror in question was influenced by pre-trial publicity or community sentiment.[12] Our

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11. We note that the statutory presumption of correctness in federal habeas proceedings, *see* 28 U.S.C. § 2254(d), applies to a state court's determination that a particular juror could be impartial. The Court in *Yount* found "good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions" because "the determination has been made only after an extended *voir dire* proceeding designed specifically to identify biased veniremen" and because "the determination is essentially one of credibility, and therefore largely one of demeanor." 467 U.S. at 1038.

12. Rock objected to the juror because she was enrolled in a class taught by the prosecutor's law partner. Tr. 383. Rock did not contest in his omnibus post-trial motion the trial court's refusal to sustain his objection. Nor does he challenge the trial court's decision on appeal.

review of the record shows that the *voir dire* of this juror provided ample support for the trial court's conclusion that she had not made up her mind as to Rock's guilt or innocence and that she would be impartial.

Indeed, our review of the entire *voir dire* transcript reveals that the trial court conducted a patient and careful examination of the potential jurors and gave Rock's counsel wide latitude in his follow-up examination of the veniremen. *See, e.g.*, Exhibit IIA, Transcript of Proceedings at 48-51, 53, 128, 131-36, 258-59, 268-69, 273, 309-12, 344-47, 361-66, 459-61, 522-26. The transcript provides more than an adequate basis for sustaining the trial court's conclusion regarding the jury's impartiality. We thus find no merit in Rock's claim that his Sixth Amendment rights were compromised.

VI.

Rock's final contention concerns the increased sentence he received after his retrial. Rock argues that his due process rights were violated when Judge Keller imposed a harsher sentence after the second trial. While it is far from clear that the time Rock will serve under his second sentence will be any different than he would have served under the first, Judge Keller and the Commonwealth, as well as Rock, have viewed the practical effect of the second sentence to be harsher and we have made that assumption in deciding this appeal.[13] Nevertheless, we conclude

13. Throughout the period from 1977 to 1986, a life sentence in Pennsylvania carried no possibility of parole. In this context, two consecutive life sentences would appear no more onerous

that Judge Keller's sentence did not violate Rock's right to due process of law.

At Rock's second sentencing, his counsel told Judge Keller that Rock was going "to serve whatever [a life sentence] means in Pennsylvania" and that the only issue before the court was whether it was "going to run some consecutive terms on that." Transcript of Proceedings of Sentencing at 9. Counsel took the position that Judge Keller could not impose consecutive life terms because Judge Eppinger had not done so and because the trial record before Judge Keller was not materially different from that before Judge Eppinger. As counsel read *North Carolina v. Pearce*, 395 U.S. 711 (1969), and its progeny, Judge Keller was free to impose a harsher sentence only if he could point to facts unknown to Judge Eppinger that would justify such a sentence. Judge Keller rejected this view:

> Mr. Rock, we do not agree with Mr. Rudovsky's analysis of the case he cited. We do not think that there is a prohibition against a court on a retrial and reconviction from reviewing the facts anew in determining what is an appropriate sentence under those facts. As we said, we do not know what went through Judge Eppinger's mind, whether he would have even understood the significance of zeroing in a rifle; but I do.

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in practical effect than two concurrent life sentences. The parties and Judge Keller apparently believed, however, that Rock could reasonably hope for a commutation of his sentences and that obtaining a commutation of consecutive sentences would be significantly more difficult than obtaining a commutation of concurrent ones.

Tr. 15.

Judge Keller then went on to explain to Rock the disparity between his sentence and that of Judge Eppinger:

> Judge Eppinger did not impose consecutive sentences. That certainly was within his discretion. Whether it is within my discretion to change that, I guess, only time will tell.
>
> I want to say to you that it has always been my position that crimes do not get cheaper by the dozen. You killed two people. It is absolutely an anomaly and illogical to me to think if you killed two, three, five, or ten that one life sentence is all you should serve; because there were two lives that were snuffed out. Similarly, there were four people that the jury concluded you attempted to murder and two that you committed aggravated assault with intent to do serious bodily injury to; and the Court simply sees no justification for the position that they should all be lumped together.

Tr. 18-19.

In his opinion on Rock's post-trial motions, Judge Keller noted that his "sole involvement in the first trial was to preside over a suppression hearing," and that he had read no part of the record of the proceedings prior to the retrial other than the opinion of the federal habeas corpus court. Opinion and Order at 9 (August 1, 1986).[14]

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14. Rock asserts in his brief that "Judge Keller and Judge Eppinger *jointly* heard argument and ruled on all of the post-trial motions, including the ineffectiveness claim which ultimately resulted in a new trial." Appellant's Brief at 25 (emphasis in the original). In fact, Judge Keller did not

We are thus presented with a situation in which a second sentencing judge, serving on the same court as the first sentencing judge, imposed a harsher sentence after retrial, explaining on the record that he had taken a fresh look at the case and had concluded that a more severe sentence was necessary in his judgment to reflect the seriousness of the offenses.

Due Process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). In order to assure the absence of a vindictive or retaliatory motivation, the Court held in *Pearce* that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Id.* at 725-26. This requirement has been read to create "a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *United States v. Goodwin*, 457 U.S. 368, 374 (1982). In *Pearce*, the Court indicated that the "objective information" relied upon must concern conduct of the defendant occurring after the first sentencing.

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participate in the post-trial proceedings. *See* Transcript of post-trial hearing (November 8, 1979). Judge Keller's name was included along with Judge Eppinger's name on the title page of the court's Opinion and Order on Rock's post-trial motions (April 30, 1980). However, we understand Judge Keller's contribution to that opinion to be limited to Judge Eppinger's incorporation of Judge Keller's pre-trial opinion on Rock's suppression motion. *See* Opinion and Order at 7 ("We find that Judge Keller has correctly stated the law and that it was not error to refuse to suppress the statements; thus we incorporate his opinion filed May 9, 1978 in this opinion.").

395 U.S. at 726. It is now clear that the *Pearce* presumption may be rebutted by an explanation of the second sentencer based upon information concerning conduct or events preceding the first sentencing so long as that information was not available to the judge imposing the first sentence. *Texas v. McCullough*, 475 U.S. 134, 141-44 (1986). As Rock stresses, however, no Supreme Court case holds that an explanation like that of Judge Keller satisfies the record explanation requirement of *Pearce* where the doctrine of that case is applicable.

The case law decided since *Pearce* makes it clear that the presumption of vindictiveness does not apply in every case where a convicted defendant receives a heavier sentence on retrial. *Alabama v. Smith*, 490 U.S. 794, 799 (1989); *McCullough*, 475 U.S. at 138. Because the *Pearce* presumption "may operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct," the Court has limited its application to circumstances where there is a "reasonable likelihood" that the increase in sentence resulted from actual vindictiveness on the part of the sentencing authority. *Alabama v. Smith*, 490 U.S. at 799 (quoting *Goodwin*, 457 U.S. at 373). *See also Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (due process "is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'"). As the Court emphasized in *McCullough*, "vindictiveness of a sentencing judge is the evil the Court sought to prevent [in *Pearce*] rather than simply enlarged sentences after a new trial . . . . Accordingly, in each case, we look to the need, under the

circumstances, to 'guard against vindictiveness in the resentencing process.'" 475 U.S. at 138 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)).

The Court found no need to guard against vindictiveness in *Colten v. Kentucky*, 407 U.S. 104 (1972), where the defendant's enhanced sentence was imposed by a second court in a two-tier system in which a defendant convicted of a misdemeanor in an inferior court had the right to a trial *de novo* in a superior court. 407 U.S. at 105-06. In refusing to apply the *Pearce* presumption, the Court reasoned that a trial *de novo* was "not an appeal on the record," but "represent[ed] a completely fresh determination of guilt of innocence" by a tribunal that was not being "asked to do over what it thought it had already done correctly." 407 U.S at 117.

Similarly, in *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), the Court found the *Pearce* presumption inapplicable where, after a defendant's retrial following a successful appeal, a second jury imposed a lengthier sentence than the defendant received from a prior jury. The Court reasoned that a second jury, "unlike a judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication." 412 U.S. at 27. It noted further that a jury "is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." *Id.*

The Court employed a similar rationale in *McCullough*. The defendant in *McCullough* was sentenced to twenty years imprisonment by a jury after his initial murder conviction. The trial judge

subsequently granted the defendant's motion for a new trial on the basis of prosecutorial misconduct. The same judge presided over the defendant's retrial, after which a jury again returned a guilty verdict. This time, however, the defendant elected to have his punishment imposed by the trial judge, who then sentenced the defendant to fifty years imprisonment. Although the judge expressly justified the increased sentence by pointing to the testimony of two new witnesses at the retrial, she candidly acknowledged that "had she fixed the first sentence, she would have imposed more than 20 years." 475 U.S. at 136.

In upholding the defendant's second sentence, the Court reasoned that a trial judge who had granted the defendant's motion for a new trial would have "'no motivation to engage in self-vindication,'" and that "[i]n such circumstances, there is also no justifiable concern about 'institutional interests that might occasion higher sentences . . . .'" 475 U.S. at 139 (quoting *Chaffin*, 412 U.S. at 27).

The *McCullough* Court then provided an alternative, independent basis for finding the *Pearce* presumption inapposite:

> The presumption is also inapplicable because different sentencers assessed the varying sentences that McCullough received. In such circumstances, a sentence "increase" cannot truly be said to have taken place. In *Colten v. Kentucky*, *supra*, which bears directly on this case, we recognized that when different sentencers are involved,
>
> > [i]t may often be that the [second sentencer] will impose a punishment more severe than

> that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty." *Id.*, at 117.
>
> Here, the second sentencer provides an on-the-record, wholly logical, nonvindictive reason for the sentence. We read *Pearce* to require no more, particularly since trial judges must be accorded broad discretion in sentencing, see *Wasman*, *supra*, at 563-564.

475 U.S. at 140 (ellipses in the original).[15]

We read *Colten*, *Chaffin*, and the quoted portion of *McCullough* to stand for the proposition that the *Pearce* presumption does not apply where the second sentence is imposed by a different sentencer and the record provides affirmative assurance that the harsher sentence reflects simply a fresh look at the facts and an independent exercise of discretion.[16] Thus, where

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15. The *McCullough* court went on in a subsequent section of its opinion to hold that, were *Pearce* applicable, the judge's reference to the testimony of new witnesses at the second trial would satisfy the requirements of that case. All of the above-quoted text thus relates to the court's initial holding that the *Pearce* presumption was inapplicable and, in this context, it seems clear that the reference to an "on-the-record reason" is not limited to a reason that would rebut the *Pearce* presumption.

16. The quoted portion of *McCullough* has been read more broadly by at least one commentator to indicate that the *Pearce* presumption is inapplicable whenever the judge who imposed the second sentence had no reason to indulge in self-vindication. *See* W. LaFave & J. Israel, *Criminal Procedure*, § 26.1 at 76-78 (Supp. 1991). If one reads *McCullough* in this

a judge who imposes the second sentence has no material contact with the initial trial or sentence and "provides an on-the-record, wholly logical, non-vindictive reason for the harsher sentence," it is not necessary for him or her to invoke facts not available at the time of the first sentence. In this case, Judge Keller explained that the sentence disparity was attributable to the fact that he, like the judges in *Colten* and *McCullough*, was taking a fresh look at the relevant facts and exercising an independent judgment. His entirely plausible explanation for his sentence, together with the fact that Judge Keller had no material contact with the first proceeding, provide adequate assurance of an absence of vindictiveness.

Since Rock is not aided by the *Pearce* presumption, we will sustain his sentence absent proof of actual vindictiveness. *Alabama v. Smith*, 490 U.S. at 799-800 (citing *Wasman v. United States*, 468 U.S. 559, 569 (1984)). Rock argues that "it is not even necessary to rely on the presumption of vindictiveness since the trial court's actual sentence – which is patently excessive – shows an unfair retribution for the successful appeal." Appellant's Brief at 25. We

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fashion, *Pearce* is clearly inapplicable here because Judge Keller did not preside at the initial trial, did not impose the initial sentence and had nothing to do with any error identified by the habeas court. While Judge Keller did preside over a suppression hearing prior to the first trial, the district court in Rock's first habeas proceeding rejected Rock's argument that Judge Keller had improperly refused to grant the motion to suppress. *See Rock v. Zimmerman*, 543 F. Supp. 179, 190-91 (M.D. Pa. 1982). Thus, Judge Keller had no motive to engage in self-vindication. Like the judge in *Colten*, he was not asked to do over anything which he thought he had already done correctly.

reject, however, the idea that two consecutive life sentences for two murders committed in the premeditated, willful, and deliberate manner in which Rock killed Wilbur Brookens and James Cutchall is "patently excessive." Since Rock presented no other evidence in support of his claim that Judge Keller acted with actual vindictiveness, his sentence must stand.

VII.

The order of the district court will be affirmed.

Judges Greenberg, Nygaard and Alito concur in the judgment of the court and join all of this opinion other than Section III.

Mansmann, *Circuit Judge*, concurring and dissenting.

I remain convinced that the improper charge to the jury cannot be dismissed as harmless error and so dissent from Part IV of the opinion of the Court. Because the jury clearly struggled with the improper presumption and was repeatedly misinstructed by the trial judge, I cannot agree that "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Yates v. Evatt*, __ U.S. __, 111 S. Ct. 1884, 1892 (1991) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). I concur in the majority's conclusion that the charge was erroneous as a matter of law; I would not reach the venue and sentencing issues.

I.

The majority asserts that the evidence in support of the first degree murder verdict was overwhelming and rendered the unconstitutional

presumption harmless error. It is unwise, however, to infer that the jury made a finding of specific intent from the jury's finding of sanity combined with its use of the improper instruction. By positing both that the jury could not have found Rock sane and free from diminished capacity and that the jury employed the improper presumption to find that Rock did not intend to kill Brookens and Cutchall, the majority effectively relieves the Commonwealth of its burden of proving specific intent, an element required for first degree murder regardless of a threshold finding of sanity. Although I would agree with the majority that the jury *may* have found as it posits, I am simply unconvinced beyond a reasonable doubt that the jury did so find.

The circumstantial evidence of Rock's specific intent to murder Brookens and Cutchall was less than overwhelming. To prove first degree murder, the Commonwealth must prove "an intentional killing," defined as "[k]illing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." 18 Pa. C.S.A. § 2502(d) (Purdon's 1983). Although I concede that the evidence would have supported an inference of specific intent, I dispute the majority's conclusion that the jury was left with no rational alternative on that question.

The defense expert witness, Dr. Emanuel Tanay, testified that he believed Rock's acts of setting fire to his home and murdering the two victims did not constitute behavior "acceptable" to Rock, and was "contrary to his past history and contrary to his wishes." Dr. Tanay further opined that Rock acted "as if he was responding to some delusions . . . re-enacting something." Tr. at 505. There was

ample evidence to support the factual components of Tanay's theory. Rock had demonstrated great interest and pride in his home, purchasing items for landscaping and paying his mortgage just hours before setting his home on fire. The record shows an absence of any evidence that Rock had previous brushes with the law or that he harbored any motive beyond his general frustration with his life. Indeed, there was no evidence that Rock harbored a particular malice toward these specific victims.

Rock testified that he unsuccessfully ransacked his home and shed looking for a magazine pouch, then doused the structures with gasoline and set them on fire in a state of agitation and confusion. Tr. 421-22. Rock further testified that after hearing shots and explosions that frightened him,[1] he ran to the rear of his burning home and began shooting "at anything that moved." Tr. 427-29. He expressly denied any knowledge of shooting, or intent to shoot, at people. Tr. 429.

It is noteworthy that the District Attorney conceded in his summation that the evidence of intent was circumstantial; he argued that the jury should *infer* specific intent from Rock's actions. Tr. 667. Certainly the jury could have *inferred* specific intent; I am concerned only that the jury may have relied upon the unconstitutional presumption.

II.

Much of the majority's harmless error analysis relies upon its reading of the presumption. Thus,

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1. There was testimony to support the theory that some of those explosions would have been consistent with the burning of ammunition left inside the burning structures.

the majority interprets the word "intentional" to modify both the "use of a deadly weapon" and "against a vital part of the body" predicates. This reading is essential to the majority's harmless error analysis, because if "intentional" relates solely to the predicate "use of a deadly weapon," then the presumption may have been applied without the predicate finding that Rock possessed specific intent to kill the victims. This latter understanding would be consistent with Rock's testimony that he believed he was shooting at moving objects but lacked any intention to shoot at people. If this is so, the jury may have applied the improper presumption in arriving at its conclusion that Rock committed a "willful, deliberate and premeditated murder."

After some deliberation, the jury posed questions concerning insanity and diminished capacity and asked, significantly, "Explain intent in regards to the hitting of a vital organ." The question itself reveals that the jury recalled and puzzled over the precise language of the improper presumption. More importantly, in answer to this question the trial court reiterated the improper presumption but on this occasion failed to include any qualifying language. In fact, the trial court made matters worse by adding another presumption: "Every person is presumed to intend the natural and probabl[e] consequences of his act . . . ." Armed with these improper instructions, the jury resumed deliberations and returned a guilty verdict only ninety minutes later. This reiteration served to reinforce an unconstitutional presumption that was not countermanded by curative instructions or the weight of the evidence. *See Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946).

The verdicts of guilty for the attempted murder counts do not assuage my concern in this regard. The jury was invited to deliberate on the attempted murder charges *after* the murder charges by virtue of the sequence of the trial judge's charge. Moreover, the trial judge incorporated by reference the improper presumption on the murder counts into the instructions on the attempted murder counts. The majority's reasoning, while intellectually persuasive, does not satisfy my concern that the jury may have followed the sequence of the trial judge's instructions and simply determined that failure to kill the attempted murder victims warranted conviction on those counts.

For these reasons, I respectfully dissent from Part IV of the opinion of the Court. Judge Cowen agrees with this concurring and dissenting opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit